



# FEDERAL REGISTER

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Vol. 80

Wednesday,

No. 72

April 15, 2015

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Part II

## Department of Labor

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Employment and Training Administration

20 CFR Part 655

Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States; Proposed Rule

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Part 655**

RIN 1205-AB70

**Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States****AGENCY:** Employment and Training Administration, Labor.**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Department of Labor (Department) is proposing to amend its regulations governing certification of the employment of nonimmigrant workers in temporary or seasonal agricultural employment under the H-2A program to codify certain procedures for employers seeking to hire foreign temporary agricultural workers for job opportunities in sheepherding, goat herding and production of livestock on the open range. Such procedures must be consistent with the Secretary's statutory responsibility to ensure that there are no able, willing, qualified and available U.S. workers to perform these jobs, and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. Before the current rulemaking, variances from the general H-2A regulatory requirements were established and revised for these occupations through sub-regulatory guidance, *i.e.* "special procedures," that were issued in the form of separate Field Memoranda or Training and Employment Guidance Letters. The U.S. Court of Appeals for the District of Columbia Circuit recently ruled that the existing special procedures for sheepherding, goat herding and open range production of livestock are not interpretive rules but rather include substantive departures from established regulatory requirements necessitating notice and comment rulemaking under the Administrative Procedure Act. This proposed rule provides the public with the notice and opportunity to comment on proposed procedures to be followed in the filing and processing of applications involving herding and production of livestock on the open range. Among the issues addressed are the qualifying criteria for employing foreign workers in the applicable job opportunities, preparing job orders, program obligations of employers, filing of H-2A applications requesting

temporary labor certification, recruiting U.S. workers, determining the minimum offered wage rate, and the minimum standards for mobile housing on the open range. The Department's goal is to establish a single set of regulations enabling employers seeking to hire foreign temporary agricultural workers for both herding and production of livestock on the open range to comply with their obligations under the H-2A program given the unique characteristics of these job opportunities in their industry.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before May 15, 2015.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB70, by any one of the following methods:

- *Federal e-Rulemaking Portal*  
[www.regulations.gov](http://www.regulations.gov). Follow the Web site instructions for submitting comments.
- *Mail or Hand Delivery/Courier:*  
Please submit all written comments (including disk and CD-ROM submissions) to Adele Gagliardi, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method and within the designated comment period. Comments received by means other than those listed above or received after the comment period has closed will not be reviewed. The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters against including personal information such as Social Security Numbers, personal addresses, telephone numbers, and email addresses in their comments as such information will become viewable by the public on the <http://www.regulations.gov> Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments through the <http://www.regulations.gov> Web site.

**Docket:** For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at <http://www.regulations.gov>. The Department will also make all the comments it receives available for public inspection during normal business hours at the Employment and Training Administration's (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the ETA Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

**FOR FURTHER INFORMATION CONTACT:** For further information, contact William W. Thompson, II, Acting Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Background***A. The Statutory and Regulatory Framework*

The Immigration and Nationality Act (INA or the Act) establishes the H-2A visa classification for employers to employ foreign workers on a temporary basis to perform agricultural labor or services. INA Section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* INA Secs. 214(c)(1) and 218, 8 U.S.C. 1184(c)(1) and 1188. The INA authorizes the Secretary of the Department of Homeland Security (DHS) to permit the admission of foreign workers to perform agricultural labor or services of a temporary or seasonal nature if the

Secretary of the Department of Labor (Secretary) certifies that:

(A) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1).

The Secretary has delegated these responsibilities, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). Sec. Order 06-2010, 75 FR 66268 (Oct. 27, 2010). The Secretary has delegated responsibility for enforcement of the worker protections to the Administrator of the Wage and Hour Division (WHD). Sec. Order 5-2010, 75 FR 55352 (Sept. 10, 2010).

The Department has operated the H-2A program for more than two decades under regulations promulgated under the authority of the Immigration Reform and Control Act of 1986 (IRCA), which amended the INA and established the H-2A program.<sup>1</sup> In 1987, the Department issued the first H-2A regulations (the 1987 regulations). 52 FR 20496 (Jun. 1, 1987). The Department's 1987 regulations provided for the establishment of special procedures for certain occupations, as long as they did not deviate from the Secretary's statutory responsibility to determine U.S. worker availability and to ensure that the importation of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1)(B); 20 CFR 655.93(b) 1987. The Department has issued several special procedures guidance documents under the 1987 regulations.

The 1987 regulations remained in effect, largely unchanged, until the Department promulgated new H-2A regulations on December 18, 2008. 73 FR 77110 (Dec. 18, 2008) (the 2008 Final Rule). The 2008 Final Rule implemented several substantive changes to the program, and revised the companion regulations at 29 CFR part 501 governing WHD's enforcement responsibilities under the H-2A

program. The 2008 Final Rule retained the authority of the OFLC Administrator to develop, amend, or rescind special procedures, enumerating those in effect at that time, including H-2A applications for sheepherders in the Western States as well as the adaptation of such procedures to the open range production of livestock. 20 CFR 655.102.

After the Department determined that the policy underpinnings of the 2008 Final Rule did not provide an adequate level of protection for either U.S. or foreign workers, the Department commenced a new rulemaking process that culminated in the publication of revised H-2A regulations on February 12, 2010. 75 FR 6884 (Feb. 12, 2010) (the 2010 Final Rule). The 2010 Final Rule better met the Department's responsibility to provide that wages and working conditions of U.S. workers are not adversely affected, by adjusting wages and working conditions requirements and establishing incentives for ensuring employers demonstrate that they have performed an adequate test of the U.S. labor market. The 2010 Final Rule retained the authority of the OFLC Administrator to develop, amend, or rescind special procedures, recognizing that variances from the regular H-2A labor certification processes are appropriate to permit access to the program for specific industries or occupations.

#### *B. Legislative and Sub-Regulatory Framework for Special Procedures for Herding and Production of Livestock on the Open Range*

Historically, employers in a number of States (primarily but not exclusively in the West) have used what is now the H-2A program to bring in foreign workers to work as sheep and goat herders. Sheep and goat herders attend to herds of sheep or goats, and oversee the herd as it moves from one area to another. Herders facilitate grazing, and they settle the herd to rest for the night, guard it from predatory animals and other dangers (e.g., poisonous plants and dangerous terrain), examine animals for illness, and administer medication, vaccinations, and insecticide care, as needed. This herding takes place on the open range which requires the herders to live on the open range with the herd, monitoring and attending to the herd's needs on an on-call basis up to 24 hours per day, 7 days per week, as the herd moves across remote range lands and isolated and often mountainous terrain. These herders may also assist in lambing, docking, and shearing. The employer may require the herd to be brought to

the main ranch or farm location for short periods, for the care or sorting of the animals. A herder's time at the ranch is limited, however, as the purpose of the work is to attend to the herd as it grazes on the open range. The unique occupational characteristics of sheep and goat herding (spending extended periods of time herding animals across remote open range lands; being on call to protect and maintain herds up to 24 hours a day, 7 days a week) have long been recognized by the Department as significant factors that limit the number of U.S. workers interested in performing these jobs.

Congress has recognized the lack of U.S. workers available to perform these jobs and has sought to address employers' need for labor. During the early 1950's, Congress enacted statutes authorizing the permanent admission of a certain number of "foreign workers skilled in sheepherding" to fill the demand for workers in sheepherding jobs. Pub. L. 81-587, 64 Stat. 306 (Jun. 30, 1950); Pub. L. 82-307, 66 Stat. 50 (Apr. 9, 1952); and Pub. L. 83-770, 68 Stat. 1145 (1954). These statutes enabled skilled foreign sheepherders to gain entry into the country on an expedited basis, provided that they were otherwise admissible into the United States for permanent residence.

During 1955 and 1956, the House Judiciary Committee (Committee), in response to requests from sheep ranchers, investigated allegations that a number of foreign sheep and goat herders admitted under those statutes were leaving herding shortly after arriving in the United States, and were instead becoming employed in other industries and occupations. In a report issued on February 14, 1957, the Committee found that American employers and the sheep-raising industry had not fully benefitted from the services of foreign sheepherders, as was intended by the legislation. H.R. Rep. No. 67, 85th Cong., 1st Session (1957). The Committee recommended that no additional legislation be enacted to admit foreign sheepherders and also that the process for bringing future foreign sheepherders be governed by the H-2 temporary worker provisions of the INA administered by the Immigration and Naturalization Service (INS) (now, U.S. Citizenship and Immigration Services (USCIS)) and the Department. *Id.* at 4-5.

Following the recommendation in the Committee's report, Congress permitted the previously-enacted legislation to expire. No additional legislation for foreign sheepherders has been enacted since then. The labor certification program for temporary foreign sheep

<sup>1</sup> The Immigration and Nationality Act of 1952 created the H-2 temporary worker program. Pub. L. 82-414, 66 Stat. 163. In 1986, IRCA divided the H-2 program into separate agricultural and non-agricultural temporary worker programs. See Pub. L. 99-603, sec. 301, 100 Stat. 3359 (1986). The H-2A agricultural worker program designation corresponds to the statute's agricultural worker classification in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

and goat herders was instead implemented through the H-2 program and then the successor H-2A program after the passage of IRCA.<sup>2</sup>

Beginning in 1989, consistent with Congress's historical approach and in recognition of employers' need for appropriate access to foreign workers to perform these jobs, the Department established variances from certain H-2A regulatory requirements and procedures to allow employers of open range herders to use the H-2 program. Thus, Field Memorandum (FM) 74-89, *Special Procedures: Labor Certification for Shepherders Under the H-2A Program* (1989) established special procedures for sheep and goat herders. Due to the evolution of the H-2A program, these special procedures were rescinded and new special procedures were established by FM 24-01, *Special Procedures: Labor Certification for Shepherders Under the H-2A Program*, which were in use from August 1, 2001 until June 14, 2011. In 2011, new special procedures containing references to and incorporating the principles of the 2010 Final Rule were implemented in Training and Employment Guidance Letter (TEGL) No. 32-10, *Special Procedures: Labor Certification Process for Employers Engaged in Shepherding and Goatherding Occupations under the H-2A Program*.<sup>3</sup>

While the shepherding program history provided a basis for establishing special procedures for the temporary employment of foreign workers in sheep and goat herding occupations, the Department recognized that the production of other types of livestock on the open range (e.g., cattle) involved duties and occupational characteristics similar to sheep and goat herders. Like sheep and goat herders, herders of other types of livestock grazing on the open range also spend extended periods of time herding animals across remote open range lands living in mobile housing, and are on call up to 24 hours a day, 7 days a week to care for and protect the herd. Accordingly, in 2007, the Department established similar special procedures for the processing of H-2A applications for certification of temporary employment in those occupations. Rather than amending the

<sup>2</sup> In 2004, shepherders were added to the Department's permanent residence program as a specific occupation eligible for exemption from the permanent labor certification process, now referred to as PERM, upon meeting certain employment criteria. 20 CFR 656.16.

<sup>3</sup> The Department's policy directives and advisories for the H-2A program, including TEGLs related to herding and livestock production on the open range, are available at on the OFLC Web site at <http://www.foreignlaborcert.doleta.gov/reg.cfm>.

TEGL specific to sheep and goat herding occupations to encompass open range herding of other types of livestock, the Department adapted and extended similar variances through TEGL No. 15-06, which guided the regulated community until the TEGL was rescinded and replaced on June 14, 2011, with TEGL No. 15-06, Change 1, *Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H-2A Program*. These new special procedures for livestock that were issued on June 14, 2011 were based on the 2010 Final Rule, which provided the OFLC Administrator (as the previous regulations had) with the authority to establish, continue, revise or revoke special procedures for processing H-2A applications so long as those procedures do not deviate from statutory requirements under the INA. 20 CFR 655.102.

### C. The Mendoza Litigation and Need for Rulemaking

On October 7, 2011, four workers filed a lawsuit in the U.S. District Court for the District of Columbia challenging these special procedures. *Mendoza v. Solis*, 924 F. Supp. 2d 307 (D.D.C. 2013). The plaintiffs, who are U.S. workers interested in herding employment, asserted that the Department violated the Administrative Procedure Act (APA) by adopting the special procedures without first providing notice and an opportunity for interested parties to comment. The district court dismissed the case, holding the plaintiffs lacked standing to bring a lawsuit on this issue.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's dismissal for lack of standing, finding that the plaintiffs had both Article III and prudential standing. *Mendoza et al. v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014). The court concluded that "[a]s participants in the labor market for herders, the plaintiffs were injured by the Department of Labor's promulgation of the TEGLs and fall within the zone of interests protected by the INA." *Id.* at 1025. In the interest of judicial efficiency, the D.C. Circuit also ruled on the merits of the plaintiffs' claim, agreeing with the plaintiffs that the Department's TEGLs constituted legislative rules subject to notice and comment under the APA. The appellate court remanded the case to the district court, which has set a rulemaking schedule.

Through this rulemaking, the Department seeks to remedy the APA violations identified by the D.C. Circuit. The *Mendoza* decision, however, is but

one reason for the promulgation of this NPRM. In these occupations the prevailing wage has served as the Adverse Effect Wage Rate (AEWR).<sup>4</sup> The on-call nature (up to 24 hours a day, 7 days a week) of the work associated with these occupations, coupled with the sustained scarcity of U.S. workers employed in open range herding and livestock production, has made determining the appropriate prevailing wage increasingly difficult under the current methodology for determining wages for these occupations. Few employers provide U.S. worker wage information in response to prevailing wage survey requests for these occupations, making it difficult for State Workforce Agencies (SWAs) to submit statistically valid prevailing wage findings to the OFLC Administrator. Therefore, through this rulemaking, the Department plans to establish a more effective and workable methodology for determining and adjusting a monthly AEWR for these unique occupations that adequately protects U.S. and H-2A workers in these occupations.

## II. Discussion of 20 CFR Part 655, Subpart C

### A. Introductory Sections

#### 1. § 655.200 Scope and Purpose of Subpart C

These introductory provisions propose to establish that, because of the unique nature of the occupations, employers who seek to hire temporary agricultural foreign workers to perform herding or production of livestock on the open range, as described in proposed § 655.200(b), are subject to certain standards that are different from the regular H-2A procedures in Subpart B of this part. To date, the Department has processed these applications using two different Departmental guidance letters containing substantially similar variances, one specific to sheep and goat herding on the open range and the other specific to open range production of other types of livestock. TEGL No. 32-10 (Jun. 14, 2011); TEGL No. 15-06, Change 1 (Jun. 14, 2011). In this

<sup>4</sup> The AEWR neutralizes any adverse effect on U.S. workers resulting from the influx of temporary foreign workers, and is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and foreign workers, if prevailing wages are below the AEWR. Employment and Training Administration, Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 FR 20496, 20502 (June 1, 1987). The AEWR is intended to ensure that the wages of similarly employed U.S. workers will not be adversely affected by the importation of foreign workers. *Id.* As noted above, the Department has set the prevailing wage as the AEWR for these occupations.

rulemaking, the Department proposes to create a single set of procedures for employers engaged in the herding or production of livestock on the open range. Establishing a single set of procedures for these occupations will create administrative efficiencies for the Department, promote greater consistency in the review of H-2A applications, provide foreign workers and workers similarly employed in the United States with the same benefits and guarantees, and provide greater clarity for employers with respect to program requirements.

In order to use Subpart C, an employer's job opportunity must possess all of the characteristics described in this subpart. The employer must be seeking workers in the herding or production of livestock on the open range, on an on-call basis, up to 24 hours per day and 7 days a week, and in locations requiring the use of mobile housing for at least 50 percent of the workdays included in the work contract period.

The Department recognizes that the employer may, at times, require the workers to bring the herd to the fixed-site ranch or farm and stay at or near the ranch or farm for periods to assist with work involving the herd that constitutes the production of livestock (*e.g.*, lambing or calving, shearing, tending to a sick animal, branding, culling, or splitting livestock from the herd for sale or transfer). During such periods at the ranch the workers may also perform minor, sporadic, and incidental work closely and directly related to the herding and production of livestock. However, any such ranch duties must be included in the job order. Such minor, sporadic, and incidental work may occur on no more than 20 percent of the workdays that the worker is at the ranch during the contract period. The job order must not include any work other than work that is herding or production of livestock or work that is closely and directly related to the herding or production of livestock.

The Department seeks comments about whether sheep and goat herding involve distinct temporary positions at different times of the year that require more than one certification to reflect distinct temporary and/or seasonal needs under the INA. Under this proposal, open range livestock occupations would continue to be limited to periods of need of not more than 10 months as under the current special procedures. Should a similar 10 month limitation apply to sheep and goat herders, to reflect more appropriately their temporary or seasonal need as required by the INA?

Specifically, the Department seeks comment on the following:

- Based on information obtained during enforcement investigations, the Department understands that in some circumstances separate winter open range seasons and summer open range seasons exist. Between these seasons, workers may spend months at a time at the ranch; however, the amount of this time may vary substantially based on numerous factors, including geography and/or size of employer. Therefore, while recognizing that employer operations differ, the Department seeks comments, as reflected in the questions below, regarding a typical cycle of differing functions/locations for sheep and goat herders across the country, and the length of time and defined time periods within which these employees are on the open range as opposed to working at the ranch.

- The Department seeks information about the time periods and location of each duty typically performed by these workers.

- Do sheep and goat herders typically spend certain time periods on the range and other time periods on the ranch?

- If so, which periods are spent on the range? Which periods are spent at the ranch?

- What duties are typically performed while on the range? What duties are typically performed while on the ranch?

- If there are distinct seasonal needs for ranch and range work, would there be a need for an allowance for minor, sporadic and incidental work for open range occupations?

Where the job opportunity does not fall within the scope of this Subpart, the employer must comply with all of the regular H-2A procedures in Subpart B. If an employer submits an application containing information and attestations indicating that its job opportunity is eligible for processing under the procedures in Subpart C but later, as a result of an investigation or other compliance review, it is determined that the worker did not spend at least 50 percent of the workdays on the open range, that work performed on the ranch was not included within the scope of the job order (*e.g.*, unrelated ranch chores such as tilling soil for hay or constructing an irrigation well), or the worker performed work that is closely and directly related to herding or production of livestock during more than 20 percent of the workdays at the ranch, the employer will be in violation of its obligations under this part and, depending upon the precise nature of the violation, may owe back wages or have to provide other relief. Depending upon all the facts and circumstances,

including but not limited to factors such as the percentage of days the worker spent at the ranch, whether the work was closely and directly related to herding and the production of livestock, and whether the employer had violated these or other H-2A requirements in the past, the employer will be responsible for compliance with all of the regular H-2A procedures and requirements in Subpart B of this part, including payment of the highest applicable wage rate, determined in accordance with 20 CFR 655.122(l) for all hours worked.<sup>5</sup> In addition, the Department may seek other remedies, such as civil monetary penalties and potentially debarment from use of the H-2A program, for the violations.

This provision is also intended to provide notice to employers seeking workers in the open range production of livestock and herding occupations that they must comply with all the obligations contained in Subpart B of the rule, unless specifically addressed in Subpart C. Such employers must refer to all of the obligations in Subpart B before utilizing the specific variances from those requirements that comprise proposed Subpart C. The obligations contained in Subpart B, such as ensuring the general contents of job orders, the three-fourths guarantee, obligations to workers in corresponding employment, the prohibition of agency payments, and the provision of housing and transportation, have been fully explained elsewhere. *See* 75 FR 6884 (Feb. 12, 2010).

## 2. § 655.201 Definition of Terms

The proposed definitions contained in this subpart supplement the definitions in Subpart B of 20 CFR part 655, subparts B and F of 20 CFR part 653, and 20 CFR part 654. This subpart adds definitions for terms specific to the herding or production of livestock occupations working on the open range: Herding; livestock; minor, sporadic, and incidental work; mobile housing; open range; and production of livestock. These are new definitions, which did not previously exist in the TEGs. They are intended to assist employers in understanding the type of work that qualifies for these special procedures.

The proposed definitions of *herding* and *production of livestock* describe typical activities associated with

<sup>5</sup> Compliance with 20 CFR 655.122(l) of Subpart B requires an employer to "pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion [of an hour] worked during a pay period."

managing livestock on the open range, while the proposed definition of *livestock* describes the type of animals, when managed on the open range, covered by this Subpart. The proposed definition of *mobile housing* focuses on the movable nature of the housing used on the open range and specifies the provision in the regulation that sets forth the standards such housing must meet. The proposed definition of *minor, sporadic, and incidental work* is intended to help employers evaluate whether their job opportunity is an *open range* occupation covered under Subpart C (e.g., duties performed at the fixed-site ranch or farm that do not constitute the production of livestock must be closely and directly related to herding or the production of livestock and are limited to no more than 20 percent of the workdays spent at the ranch in the contract period).

The Department's proposed definition of *open range* describes an essential characteristic of the jobs covered under this Subpart. Whether on public or private lands, owned or not owned by the employer, the animals are roaming across range lands or remote mountainous locations not easily accessible on a daily basis from the employer's fixed-site ranch or farm. Moreover, the animals are not enclosed. For the purposes of this rule, animals are not enclosed where there are no fences or other barriers protecting them from predators or restricting their freedom of movement; rather the worker must actively herd the animals and direct their movement. Open range may include intermittent fencing or barriers to prevent or discourage animals from entering a particularly dangerous area (e.g., a steep cliff). These types of barriers prevent access to dangers rather than containing the animals, and therefore supplement rather than replace the herders' efforts.

The Department seeks comment on all the definitions. In particular, we seek comment on whether the definition of *open range* should include a minimum acreage of the land on which the animals roam. We also seek comment on whether, and under what circumstances (i.e., state requirements related to the "open range"), the regulation may take into account barriers, fences, or other enclosures on this same land. The Department also seeks comment on other factors that should be considered in the definition of *open range*.

#### B. Variances From Pre-Filing Procedures

This section enumerates the pre-filing procedures for employers seeking workers in open range production of livestock and herding occupations.

These provisions are intended to assist employers with understanding their basic obligations.

#### 1. § 655.205 Variances From Job Order Requirements

This provision addresses variances from the job order filing requirements in 20 CFR 655.121(a) through (d). The Department is proposing that an eligible employer seeking workers in open range production of livestock or herding occupations must submit its job order, *Agricultural and Food Processing Clearance Order*, Form ETA 790, directly to the National Processing Center (NPC) designated by the OFLC Administrator, rather than to the SWA. The employer must submit the job order to the NPC at the same time it submits its *Application for Temporary Employment Certification*, Form ETA 9142A, as outlined in 20 CFR 655.130. An employer submitting its application electronically using the iCERT Visa Portal System must scan and upload the job order as well as all other supporting documents.

This proposal reflects the current filing requirement in TEGL 32–10 for an association filing a master application as a joint employer with its employer-members for sheep or goat herding positions. The proposal to make the filing process the same for individual employers and associations filing as joint employers and for open range herding and livestock production occupations is intended to establish consistent handling of all applications eligible to use these procedures.

#### 2. § 655.210 Variances From Contents of Job Orders

This provision contains requirements for the content of the job order in addition to those in 20 CFR 655.122. Proposed § 655.210(a) reminds employers that if a requirement of Subpart B of this part is not addressed in Subpart C (such as workers' compensation, among other requirements), then employer-applicants must comply with the regulation as stated in Subpart B.

#### a. § 655.210(b) Job Qualifications and Requirements

The Department is proposing to retain a long-standing practice that the job offer in these occupations must include a statement that the hours of work are "on call for up to 24 hours per day, 7 days per week," rather than specific work hours. Additionally, the employer may require in its job offer that applicants possess up to 6 months of experience in similar occupations involving the herding and production of

livestock and provide verifiable references. We are proposing that an employer may specify other appropriate job qualifications and requirements for its job opportunity. These qualifications and requirements could include the ability to ride a horse, use a gun for occupational safety to protect the livestock herd from predators, or operate certain motorized vehicles (e.g., an all-terrain vehicle). The Certifying Officer (CO) may require the employer to submit documentation to substantiate the appropriateness of any job qualifications and requirements specified in the job order. In all cases, the employer must apply all qualifications and requirements included in the job offer equally to U.S. and foreign workers in order to maintain compliance with the prohibition against preferential treatment of foreign workers contained at 20 CFR 655.122(a).

#### b. § 655.210(c) Mobile Range Housing

The Department proposes that the employer disclose the use of mobile range housing when satisfying its obligation under 20 CFR 655.122(d) to ensure that it will provide sufficient housing to workers unable to reasonably return to their residence within the same day, at no cost to the worker.

In §§ 655.230 and 655.235, the Department proposes housing standards for range housing to account for the mobile nature of the housing typically used in this industry. The standards are discussed in *Section E: Mobile Housing*.

#### c. § 655.210(d) Employer-Provided Items

All H–2A employers must provide to their workers, free of charge, all tools, supplies, and equipment required to perform the duties assigned. See 20 CFR 655.122(f). DOL Wage and Hour Division investigations have found instances in which employers have failed to provide the tools/supplies/equipment necessary for the job, i.e., failing to provide boots, raingear, and/or ATV necessary for the work and/or in which the employers have charged the workers for such tools and brought them below the required wage. The proposed Subpart C regulations require the employer to provide, without charge or deposit charge, the tools, supplies, and equipment required by law, by the employer, or by the nature of the work to do the job safely and effectively. The Department proposes to add the additional requirement that the employer must also specify in the job order which items he or she will provide for the worker.

Because of the isolated nature of these occupations, an effective means of communication between worker and

employer—to enable the employer to check the worker's status and the worker to communicate an emergency to persons capable of responding—is required. The proposal specifies that such means of communication may include, but are not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The worker's location may be so remote that electronic communication devices may not work at all times. Where the employer will not otherwise make contact with the worker (e.g., when delivering food or checking on the worker and herd in-person), the employer must establish a regular schedule when the worker will be located in a place in which the electronic communication device will work so that the worker's safety and needs can be monitored. The Department expects that while the definition of "regularly" could vary, a worker must be able to communicate with his or her employer at intervals appropriate to monitoring the health and safety of the worker. The Department believes such contact is in the best interests of both the employer and the worker in the event that there are problems with the herd, the worker suffered a medical emergency, or the worker's safety is threatened. The employer's commitment to make contact with the worker at least at these regular intervals must also be disclosed in the job order. The Department seeks comment on the minimum allowable interval between contacts initiated by the employer, and whether a satellite phone or other electronic device would be an adequate substitute for a requirement related to the frequency of employer-employee contact. The Department also invites comments on how employers may satisfy the interval requirement without any new or increased costs.

In addition to the electronic communication device, other tools, supplies, and equipment are required by the nature of the work to perform the job safely and effectively. Depending on such factors as the terrain, weather, or size of the herd; particular tools, supplies, and equipment are required. For example, some workers need binoculars to monitor the herd's location and safety, or a gun to protect both the herd and themselves from predators. Others need boots, rain gear, a horse, or an all-terrain vehicle to effectively cover difficult terrain. As provided in § 655.235 regarding mobile housing standards, in areas in which the temperature is generally mild, the

employer may provide protective bedding and clothing as an alternative to heating equipment. This bedding and clothing, provided as an alternative to heating equipment, is required to perform the job and must be provided to the worker free of charge. The actual equipment required to perform the duties assigned vary, based upon factors such as the location of the herd, the number of workers available to tend the herd, and the time of year; however, whatever equipment is required by law or regulation, by the employer, or by the nature of the work must be disclosed in the job order and provided without charge to the worker. The Department invites comments on other tools, supplies, and equipment required by law, by employers, or by the nature of the work in order to perform it safely and effectively and whether it would be helpful to include in the regulation a list of items that typically are required by law or the nature of the work and location.

#### d. § 655.210(e) Meals

All H-2A employers of open range workers must provide either three sufficient prepared meals a day or provide free and convenient cooking facilities and enough food and water that is potable, or easily rendered potable, to enable the worker(s) to prepare their own meals. Historically, employers of open range sheep and goat herders have been prohibited from deducting the cost of food and meals from wages due, and employers of workers in other occupations, including open range livestock production, have had the option of doing so. As a result, under the sheep and goat herding TEGL, and pursuant to practice in the industry for some employers engaged in open range production of livestock, employers provide food, free of charge, to their workers in the field. This proposed rule adopts the practice applicable to employers of sheep and goat herders, and applies it to both employers engaged in open range herding and those engaged in open range livestock production; therefore, under this proposal, employers will not be permitted to deduct the cost of food from wages, and employers must disclose the provision of meals in the job order. However, particularly in light of the proposed increase in wages, the Department seeks comment about whether employers should be permitted to deduct costs of food and, if so, the reasonable amount of that deduction. The Department also seeks comment on what constitutes a sufficient meal for these workers, given the physically demanding nature of their work, as well

as what constitutes adequate food provision given the remote location of these workers. Also, given the remote nature of herding and production of livestock occupations on the open range, we are proposing a new specific obligation to provide workers with an adequate supply of potable water when working on the open range. See section E of this preamble for a fuller discussion on the requirements for food and potable water.

#### e. § 655.210(f) Hours and Earnings Statements

Employees principally engaged in the open range herding and livestock production are generally exempt from Fair Labor Standards Act (FLSA) minimum wage and overtime obligations under 29 U.S.C. 213(a)(6)(E), and therefore the typical FLSA recordkeeping requirements, such as those pertaining to hours worked each day and each workweek, do not apply to employers of such employees. See 29 CFR 516.1, 516.33. However, for the purpose of implementing and enforcing the requirements of the INA, some type of recordkeeping of compensable time actually worked is necessary for the Department to monitor compliance with and enforce H-2A program obligations, such as the three-fourths guarantee. See 20 CFR 655.122(i). As the Department is proposing a minimum required monthly wage rate, an hourly record for days spent working on the open range is not necessary (see proposed § 655.211). Except as discussed in the next paragraph, the Department is proposing that employers be required to keep and maintain no less than daily records for those employees engaged in open range herding or production of livestock. The records must reflect each day that the employee works or was available to work, as well as where the work is performed—on the open range or on the ranch or farm. Thus, for days when work is performed on the open range, the employer is exempt from recording the hours actually worked each day as well as the time the worker begins and ends each workday. All other regulatory requirements found in 20 CFR 655.122(j) and (k) apply.

The Department is also proposing that when herders or livestock production workers perform work on the ranch or farm, the employers must keep and maintain records of the hours that the workers work and the duties performed in that setting. Such records will enable the employer, and the Department, if necessary, to determine wages due and whether work at the ranch or farm that does not fall within the definition of the production of livestock was minor,

sporadic, and incidental (*i.e.*, occurred no more than 20 percent of the workdays spent at the ranch in the contract period). Moreover, the requirement to record employees' duties performed at the ranch permits the Department to distinguish herder- or livestock production-related ranch work from unrelated ranch work to determine whether the work performed at the ranch is in compliance with the job order and the applicable wage rate.

Employers should already be keeping and maintaining hourly work records where applicable for other ranch or farm employees as required under the regular H-2A regulations, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and the FLSA. Therefore, the Department believes that keeping records for the herders or open range production workers who are performing work on the ranch or farm does not create a significant new burden on employers.

The Department specifically invites comments on the two proposed recordkeeping requirements (to keep hourly records for work performed at the ranch and daily records of the work performed on the range) and other appropriate records employers should keep of compensable time worked in these occupations that will balance any new burdens imposed on the employer against the Department's need to monitor and enforce H-2A program obligations for open range applications as it does with all applications filed under the H-2A program.

As previously noted in this preamble, the Department is proposing to permit herders and livestock production workers, when at the ranch, to assist with minor, sporadic, and incidental work involving the herd that does not fall within the definition of the production of livestock (*e.g.*, the inspection and repair of the corral) so long as these duties are identified on the job order and they occur on no more than 20 percent of the workdays spent at the ranch in the contract period. This allowance should not be construed as a means by which to circumvent the regular H-2A program by using herders as ranch workers. The provisions of Subpart C do not apply to workers labeled as "herders" but who perform duties at the ranch on more than a minor, sporadic and incidental basis; rather, the regular H-2A program requirements apply to those workers. For example, the employer would not be permitted to pay those workers the monthly AEW as provided in Subpart C. Instead, the employer would be required to pay the workers according to the regular H-2A program provisions

(*i.e.*, payment of the highest applicable rate under 20 CFR 655.122(l) for all hours worked<sup>6</sup>). If it is determined that work performed by the herders or livestock production workers on the ranch or farm is not included within the scope of the job order, occurs at the ranch on more than 50 percent of the workdays in the contract period, or exceeds the 20 percent allowance for minor, sporadic, and incidental work, the employer will be in violation of the requirements of this part. For purposes of the 50 percent limitation for ranch work, if a majority of hours worked during a workday are spent on the ranch, it is considered to be a day worked at the ranch. If a majority of hours worked during a workday are spent on the range, it is considered a day worked on the range. However, for the purpose of determining whether the 20 percent allowance for minor, sporadic, or incidental work has been met, if any minor, sporadic, and incidental work occurs on a workday, that workday is counted towards the 20 percent allowance. As discussed above, the Department seeks comment on the nature and extent of work typically performed at the ranch or farm by herder and livestock production workers.

#### f. § 655.210(g) Rates of Pay

The Department is proposing, consistent with current practice and with Subpart B, that the employer must guarantee a wage that is no less than the minimum wage rate issued and announced annually by the Department. This amount will be set consistent with § 655.211, discussed in detail below.

An employer may prorate the monthly wage if the initial month of the job order is a partial month, or if an employee does not enter the country and report for work until the middle of a month. For example, an employer who pays based on the calendar month may pay half the required monthly wage for April if the job order begins on April 16, and may prorate if the job order begins on April 1 but the employee is unable for personal reasons to report for duty until April 16. Similarly, an employer may prorate the monthly wage if the final month of the job order is a partial month. For example, an employer who pays based on the calendar month may pay two-thirds of the monthly wage if

<sup>6</sup> Under 20 CFR 655.122(l) of Subpart B an employer must "pay the worker at least the AEW, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion [of an hour] worked during a pay period."

the job order ends on June 20. An employer also may prorate the required monthly wage if an employee is voluntarily absent from work for personal reasons. For example, if an employee returns to his home country for two weeks because of a family emergency. However, an employer must pay workers whenever they are available for work and may not encourage employees to miss work, such as when business is slow and fewer workers are required, and use that as a basis for prorating the required monthly wage. *See* WHD Field Assistance Bulletin 2012-1 (Feb. 28, 2012).<sup>7</sup>

#### g. § 655.210(h) Frequency of Pay

This provision proposes to establish the frequency of pay for these occupations to be no less than monthly. This requirement is a long-established standard in occupations involving the herding or production of livestock on the open range. With jobs in remote locations, employees may not be available to receive physical paychecks more frequently. However, employers must pay wages when due and such wage payments must be received free and clear. Therefore, if the employee voluntarily requests that the employer deposit the wages into a bank account or send a wire transfer back to the worker's home country, for example, the employer is still responsible for ensuring that wages are paid when due. The employer may not derive any benefit or profit from the transaction and must be able to demonstrate that the wage payment was properly transmitted to and deposited in the designated bank account or recipient on behalf of the employee. *See* WHD Field Assistance Bulletin 2012-3 (May 17, 2012). The Department specifically invites comments on how frequently employers in these industries should be obligated to provide pay, and whether the Department should require employers to prorate the salaries and issue paychecks in response to workers' requests in the event they want access to their wages on a more frequent basis.

#### C. § 655.211 Variance From the Wage Rate

Historically, herding employers have not paid the hourly AEW required for other H-2A employers. As discussed above, the 1987 and subsequent regulations authorized the creation of special procedures for certain occupations. Further, the OFLC

<sup>7</sup> WHD Field Assistance Bulletins are available at on the WHD Web site at <http://www.dol.gov/whd/FieldBulletins/>.



Administrator assumed the authority to establish monthly, weekly, or semi-monthly AEWRs for “occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock.” See 20 CFR 655.102. Accordingly, the guidance for these occupations exempted employers from paying at least the hourly AEWR in favor of an occupation-specific monthly, weekly, or semi-monthly AEWR. Historically, the AEWR for these occupations was determined based on prevailing wage surveys of employers conducted by the SWAs. The Department proposes to continue to use a monthly AEWR for these occupations because of the difficulties in tracking and paying an hourly wage rate to workers engaged in open range occupations given the remote location of the work and the sporadic and unpredictable nature of the duty hours on any given day.

To determine the AEWR for these occupations under the guidance, the Department historically followed the process as described in the *ETA Handbook 385*, defining the “Domestic Agricultural In-Season Wage Finding Process.” Each year since the promulgation of the 1987 regulations, SWAs conducted agricultural prevailing wage surveys, including surveys of employers in States where open range herding and production of livestock occupations are typically found. The SWAs attempted to obtain information from these employers, voluntarily, about the wages being paid exclusively to U.S. workers. The exclusion of H-2A nonimmigrant workers from the survey is required by *ETA Handbook 385*. After the OFLC Administrator determined that the computed wage rate derived from a SWA survey was statistically valid, it was designated as the prevailing wage rate and used as the AEWR for the occupation in that State.

The central dilemma faced by the Department for decades has been the dearth of information available to it through these surveys regarding the actual wages paid to U.S. workers. Often, and almost always more recently, the SWAs determine that there are no survey results or the survey does not return statistically valid results. Thus, for many years, the Department has been unable to determine a statistically valid prevailing wage rate each year in each State in which one is needed, requiring the OFLC Administrator to set the AEWR based on other data or to use the survey results from another adjoining area or State.

Both Field Memorandum 24-01, which established the special

procedures from 2001 to 2011 for sheep and goat herding occupations, and Field Memorandum 74-89, the predecessor guidance in place from 1989 to 2001 (with various amendments), established that in the event of inadequate sample sizes, “every attempt will be made to establish a prevailing wage by using other comparable information, e.g., utilizing data from adjoining areas or States, merging shepherd (goat herder) data from several States or using past survey data for shepherders (goat herders) in that State.” Therefore, the Department set wages based, where possible, on the wages actually provided in that State to U.S. workers in the occupation; but where such data is not available the guidance permitted aggregating data from contiguous States, or continuing the previous year’s wage. Where several contiguous States did not produce a statistically valid wage, it was not possible to aggregate State wage data, and previous survey data from the same State could be carried forward instead. Because almost every State experienced years in which no wage report could be statistically verified, wage stagnation in varying degrees across these occupations has been the inevitable result in all but two States.

Two States have legal mandates that set wages for these occupations, which have typically been higher than the DOL-set AEWR for the occupations. California law provides for increases to shepherd wages established by its Industrial Welfare Commission based on corresponding increases in the State’s minimum wage. Cal. Labor Code § 2695.2(a) (West 2003). The current minimum salary for shepherders in California as of July 1, 2014, is \$1,600.34 per month, and effective January 1, 2016, the minimum monthly salary for shepherders will be \$1,777.98.<sup>8</sup> Oregon’s shepherd wages are based on a court settlement reached two decades ago, which set a wage for shepherders and required them to be adjusted annually to reflect adjustments to the State minimum wage and the Consumer Price Index; that amount is \$1,319.07 per month in 2014.<sup>9</sup> *Zapata v. Western Range Association*, Civ. N. 92-10-25, 244L (Ore. 1994).<sup>10</sup>

<sup>8</sup> See State of California Department of Industrial Relations, Division of Labor Standards Enforcement at [http://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](http://www.dir.ca.gov/dlse/faq_minimumwage.htm).

<sup>9</sup> According to the Oregon SWA’s ETA Form 232, Domestic Agricultural In-Season Wage Report, the SWA applied the State minimum wage statute and the guidelines in the *Zapata* settlement to arrive at \$1,319.07, the minimum monthly wage applicable to shepherders in Oregon in 2014.

<sup>10</sup> The Department understands that the wage set by the *Zapata* settlement may be superseded by the State’s more recent interpretation of its minimum

In contrast, wages for these occupations in other States effectively have not increased since 1994. A memorandum from Barbara Ann Farmer, Administrator, Office of Regional Management, to regional Certifying Officers in 1993, noted that of the 14 State-based AEWRs for Shepherders and Goat Herders that were determined in 1994-1995, nine were set at \$700 per month and three were set at \$650 per month. Of the remaining two AEWR determinations, the Arizona AEWR was based on a reported weekly wage of \$205, and the Idaho AEWR was set at \$750 per month. By comparison, 11 of the current 14 listed AEWRs for sheep and goat herding are \$750 per month, indicating that in the vast majority of States sheep and goat herder wages have increased only \$50 per month in the most recent 20 years of the program. The open range livestock wages are currently somewhat higher, set in every case at \$875 per month. 78 FR 19019, 19021 (Mar. 28, 2013).

The 2011 TEGLs provided for small but distinct variations to the process. First, where the SWA survey results were insufficient to establish a prevailing wage rate for occupations involving the open range production of livestock, shepherding and goat herding, due to inadequate sample size or another valid reason, the applicable TEGL’s wage setting procedures allowed the Department to issue a prevailing wage or piece rate for that State based on the wage rate findings submitted by an adjoining or proximate SWA for the same or similar agricultural activity, among other options.<sup>11</sup> This sought to

wage requirements. See [http://www.oregon.gov/boli/TA/pages/t\\_faqs\\_agric.aspx](http://www.oregon.gov/boli/TA/pages/t_faqs_agric.aspx). Based on this analysis, workers who spend more than 50 percent of their time in the range production of livestock are exempt from minimum wage. However, to be exempt, Oregon workers must be paid on a salary basis, which is defined as 2,080 hours times the current minimum wage, then divided by 12. For example, effective January 1, 2015, the Oregon minimum wage increased to \$9.25, so the required minimum salary for workers in the range production of livestock is \$9.25 times 2,080 hours divided by 12 months, or \$1,603.33 per month.

<sup>11</sup> OFLC used three main principles in establishing the prevailing wage rates for States that had no official wage rate findings: (1) Where a State directly borders a State with a wage rate finding, that wage rate finding is assigned to the adjoining (bordering) State; (2) where a State borders more than one State with wage rate findings, the findings of the State that is more adjoining (i.e., more shared geographic characteristics, including a longer shared border) are applied to the State with no wage rate finding; and (3) where a State does not directly border a State with a wage rate finding but is within a U.S. Department of Agriculture (USDA) farm production region that includes another State either with its own wage rate finding or to which findings were applied consistent with one of the other two

Continued

avoid the continuation of the previous year's wage into one or more subsequent years. Second, the wage rates were to be published in the **Federal Register** after collection and analysis each year.

On January 8, 2013, the first wage rates after the promulgation of the 2011 TEGLs were published in the **Federal Register**. 78 FR 1260 (Jan. 8, 2013). On March 28, 2013, as a result of litigation, the Department issued a Notice amending and rescinding parts of the previous Notice "because of issues regarding the wage finding process in these states." 78 FR 19020 (Mar. 28, 2013). The wages were set in that second Notice at the previous rates, with herding wages in California and Oregon reflecting the applicable statutory or judicially set amounts. Thus, wages currently are set according to the methodology in place before the 2011 TEGLs: FM 24-10 for sheep and goat herding occupations and TEGL 15-06 for open range livestock production.

The Department has been given a broad statutory mandate to balance the competing goals of the statute to provide an adequate labor supply and to protect the jobs of U.S. workers. *See Rogers v. Larson*, 563 F.2d 617, 626 (3rd Cir. 1977), *cert. denied*, 439 U.S. 803, (1978); *AFL-CIO v. Brock*, 923 F.2d 182, 187 (D.C. Cir. 1991). With this balance in mind, we must set the prevailing wage to provide that H-2A workers are employed only where U.S. workers are not available for the job and will not be adversely affected by the presence of foreign workers, and also to foster the provision of workers for these occupations.

Given this statutory mandate, the Department proposes to establish the monthly AEW for these occupations based on the Farm Labor Survey (FLS) conducted by the National Agricultural Statistics Service (NASS) of the U.S. Department of Agriculture (USDA). Conducted annually in collaboration with the U.S. Department of Labor, the FLS provides estimates of the number of hired workers, average hours worked, total wages by type of worker (field, livestock, supervisor/manager, and other) for a specified survey week, and provides wage rates at regional and national levels. Annual average estimates for the number of all hired workers, hours worked by hired workers

principles, that wage rate finding is applied to the State with no wage rate finding. *See* Notice, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Prevailing Wage Rates for Certain Occupations Processed Under H-2A Special Procedures, 78 FR 1260, 1261 (Jan. 8, 2013). *See also* TEGL No. 15-06, Change 1 and TEGL No. 32-10.

and wage rates are included in the October FLS report, which is published in November.<sup>12</sup> The Department currently uses the NASS Farm Labor Survey to set the AEW in the H-2A program, so its adoption for herder occupations in this rulemaking would be consistent with the Department's practice with respect to all other temporary agriculture work.

The FLS defines hired workers as anyone, other than workers supplied by a services contractor, who was paid for at least 1 hour of agricultural work on a farm or a ranch. Worker type is determined by what the employee was primarily hired to do, not necessarily what work was done during the survey week. The survey seeks data on four types of hired workers: Field workers, livestock workers, supervisors (hired managers, range foremen, and crew leaders) and other workers engaged in agricultural work not included in the other three categories.<sup>13</sup>

The FLS report is based on farmers' gross wages paid to workers grouped into two broad categories: Field workers and livestock workers. Wage rates are not calculated and published for supervisors or other workers, but are for field workers, livestock workers, field and livestock workers combined, and total hired workers. Field workers include employees engaged in planting, tending and harvesting crops, including operation of farm machinery on crop farms. Livestock workers include employees tending livestock, milking cows or caring for poultry, including operation of farm machinery on livestock or poultry operations.<sup>14</sup>

The USDA survey is conducted semi-annually (the April survey collects wage estimates for the January and April reference weeks, and the October survey collects wage estimates for the July and October reference weeks). Annual average wage estimates are based on these four quarterly estimates. The survey is designed to produce statistically reliable estimates of overall hired labor use and costs for California, Florida and Hawaii, and provide data

<sup>12</sup> Information about the methodology of the FLS is publicly available at: [http://www.nass.usda.gov/About\\_NASS/index.asp](http://www.nass.usda.gov/About_NASS/index.asp).

<sup>13</sup> The FLS includes work done in connection with the production of agricultural products, including nursery and greenhouse products and animal specialties such as fur farms or apiaries. It also includes work done off the farm to handle farm-related business, such as trips to buy feed or deliver products to local markets.

<sup>14</sup> To the extent workers receive incentive pay, the average wage rate would exceed the workers' actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, some statistics agencies refer to the ratio as average hourly earnings, and not as hourly wages or wage rate.

for other States except Alaska under 15 multistate groupings. Thus, for California, Florida and Hawaii, we propose to set the AEW each year as the annual average of the previous calendar year's semi-annual FLS hourly wage estimates for field and livestock workers (combined) in each of these States. For the other States the AEW will be set as the annual average of the previous calendar year's semi-annual FLS hourly wage estimates for field and livestock workers (combined) of the FLS multistate crop region to which the State belongs. Every State in the same region will be assigned the same AEW amount. The Department bases the AEW in the regular H-2A program on the combined wage estimates for both field and livestock workers. As a result, we propose that the AEW for herder occupations be similarly based on the combined estimates for field and livestock workers. The State groupings are as follows.<sup>15</sup>

Northeast I Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.  
 Northeast II Delaware, Maryland, New Jersey and Pennsylvania.  
 Appalachian I Virginia and North Carolina.  
 Appalachian II Kentucky, Tennessee and West Virginia.  
 Southeast Alabama, Georgia and South Carolina.  
 Delta Arkansas, Louisiana and Mississippi.  
 Cornbelt I Illinois, Indiana and Ohio.  
 Cornbelt II Iowa and Missouri.  
 Lake Michigan, Minnesota and Wisconsin.  
 Northern Plains Kansas, Nebraska, North Dakota and South Dakota.  
 Southern Plains Oklahoma and Texas.  
 Mountain I Idaho, Montana and Wyoming.  
 Mountain II Colorado, Utah and Nevada.  
 Mountain III Arizona and New Mexico.  
 Pacific Oregon and Washington.

The FLS defines livestock workers as follows:

Livestock Workers: Employees tending livestock, milking cows or caring for poultry, including operation of farm machinery on

<sup>15</sup> As proposed elsewhere in this NPRM, all employers must pay the higher of the Department's AEW or the agreed-upon collective bargaining wage, or the applicable minimum wage specific to the occupation(s) imposed by Federal or State law or judicial action. Accordingly, where a State-mandated minimum wage for the occupation is higher than the Department's AEW, which has been the case for employers in California and Oregon, the employer would be required to offer and pay the higher state-mandated minimum wage rate.

livestock or poultry operations. SOC codes and titles associated with livestock workers are 45–2041: graders and sorters, farm, ranch and aquacultural animal products; 45–2093: farm workers, farms, ranch and aquacultural animal products; 45–2099: all other workers, farms, ranch and aquacultural animal products; 53–7064: packers and packagers, hand, farms, ranch and aquacultural animal products.

The FLS methodology includes both livestock work performed on the ranch and on the open range.

The Department may reasonably rely on the FLS combined wage estimates for both field and livestock workers for the purpose of setting the wage for the occupation addressed in this NPRM, consistent with the Department's long standing practice for the rest of the H–2A program and the regulations in Subpart B. *Brock, supra*, 923 F.2d at 187; *United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 9–10 (D.D.C. 2010). Both historically and in this NPRM, the Department has defined the work performed by sheep, goat and other livestock herders who tend to their herds and oversee them as they move from one area to another on the open range largely based on the care and upkeep of the animals. Accordingly, we propose in this NPRM to define herding as “activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the open range.” In addition, we propose to define the production of livestock as “care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the open range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock.” These primary duties are the same as those performed by livestock workers who are covered by the FLS survey. The FLS represents the most comprehensive survey available for wages of livestock workers, and it is the best available source for wage data related to livestock work.

The Department has considered alternatives to adopting the FLS as the basis for setting herders' wages. As noted elsewhere in this NPRM, SWA surveys of range herders have become increasingly unreliable because of the small numbers of U.S. workers employed in the occupation. The lack of reportable data in the SWA surveys

have likely contributed to the stagnation of wages over the last 20 years in these occupations, which has a prohibited adverse effect on the domestic labor market. As a result, the Department cannot continue to rely on these surveys under current conditions and fulfill its statutory mandate to prevent adverse effect to workers' wages and working conditions. In addition, for the reasons contained in the Department's 2010 H–2A rule, the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey is not the preferred method for determining the prevailing wage for agricultural livestock workers.<sup>16</sup> See “Temporary Agricultural Employment of H–2A Aliens in the United States; Final Rule,” 75 FR 6884, 6896–6898 (Feb. 12, 2010). Finally, the U.S. Census Bureau's occupational description for “farming occupations” in the American Community Survey (ACS) is not sufficiently disaggregated for application to herding occupations. The ACS provides data based on samples, and because herder occupations are so small, any sample would be insufficient for statistical purposes. Moreover, census data for herders is not available from the ACS. Accordingly, based on review of available data sets on which to base herder wages and our consideration of alternatives within the context of the statute's requirements, the Department proposes to adopt the FLS as the tool for setting the AEWR for these occupations. The Department seeks comment from the public on the selection of the FLS as the data set on which to set the AEWR for herder occupations, any alternative reliable and applicable data sets that may be used for this purpose, and the relative advantages and disadvantages of each.

In order to set a monthly wage, as discussed earlier, the Department proposes to convert the hourly AEWRs based on a 44-hour workweek, which is intended to reflect the average hours worked per week over the course of the employment period in these

<sup>16</sup> As we stated in the 2010 H–2A rule, 75 FR 6884, 6896 (Feb. 12, 2010):

The OES agricultural wage data has a number of significant shortcomings with respect to its accuracy as a measure of the wages of hired farm labor suitable to be used as the AEWR. Perhaps its most substantial shortcoming in this context is that the OES data do not include wages paid by farm employers. Data is not gathered directly from farmers but from non-farm establishments whose operations support farm production, rather than engage in farm production. . . . Given that the employees of non-farm establishments constitute a minority of the overall agricultural labor force, the Department has concluded that these data are therefore not representative of the farm labor supply and do not provide an appropriately representative sample for the labor engaged by H–2A employers.

occupations. We base the proposed 44-hour workweek on comments the Department received from both associations of industry employers and from worker advocates following the court's decision in *Mendoza v. Perez*.<sup>17</sup> The worker advocates' letter suggested that the salary for these occupations should be based on a 48-hour workweek, which they offered as a “conservative” estimate using employer data.<sup>18</sup> Industry employers submitted that workers on the open range work 173.33 hours per month, or 40 hours per week, which they based on the Oregon court's approach in the *Zapata* settlement, discussed earlier.<sup>19</sup> Therefore, the Department based its proposed 44-hour workweek on the average of the suggested 40- and 48-hour workweeks.<sup>20</sup> Accordingly, the hourly AEWRs applicable to each State would be multiplied by 44 hours per week and 4.333 weeks per month to arrive at the monthly AEWRs. The monthly AEWRs may increase or decrease each year, as the hourly AEWRs do, reflecting USDA survey results. The Department seeks comment on using a 44-hour workweek to calculate the monthly AEWRs for these occupations and invites

<sup>17</sup> We received a communication from Mountain Plains Agricultural Service, dated October 8, 2014. We also received a report from consultant Julie Stepanek Shiflett on behalf of three employer associations—Mountain Plains Agricultural Service, Western Range Association and the American Sheep Industry Association—dated October 9, 2014. Finally, we received a letter from attorney Edward Tuddenham on behalf of worker representatives, dated October 30, 2014. We have placed all three submissions in the administrative record related to this rulemaking so that the public may review and comment on them.

<sup>18</sup> The data relied on by the worker advocate letter included a survey of range workers in Colorado that found that the majority of workers work over 81 hours per week. See Colorado Legal Services, *Overworked and Underpaid*, January 14, 2010, at 18 (which can be accessed at <https://www.creighton.edu/fileadmin/user/StudentServices/MulticulturalAffairs/docs/OverworkedandUnderpaidReport.pdf>). In response, the Colorado Wool Growers Association suggested that a typical work day for range workers consists of 6–8 hours of actively watching the sheep, with longer days of 10 hours in the spring and shorter days of 4–6 hours in the fall and winter, which averages to 49.5 hours per week (based on the seven-day workweek). Julie Stepanek Shiflett, *The Real Wage Benefits Provided To H–2A Sheep Herders And The Economic Cost To Colorado Ranchers* (March 2010).

<sup>19</sup> *Zapata v. Western Range Association*, Civ. N. 92–10–25, 244L (Ore. 1994).

<sup>20</sup> In its separate letter dated October 8, 2014, the Mountain Plains Agricultural Service submitted that herders work 4–8 hours per day on average. Because this suggestion encompassed a very broad range, which could result in hours worked per week anywhere between 28 (4 hours × 7 days) and 56 (8 hours × 7 days), we found it difficult to incorporate it into our proposal. However, the average hours per week based on this suggested range is 42, which is very close to the proposed 44 hours-per-week standard.

information about studies or expert opinion supporting alternative methodologies that would result in using a different workweek figure to compute the wage.

The Department proposes to phase in the new wage requirement over a 5-year transition period. In doing so, we are striking a balance between the competing goals of the statute, as discussed earlier, that require us to foster an adequate labor supply and protect U.S. workers. *Rogers v. Larson*, 563 F.2d at 626; *Brock*, 923 F.2d at 187. The new wage methodology will begin to address immediately the stagnation concerns discussed earlier. A phase-in also recognizes that the full wage increase in a single year could lead to significant disruptions that might cause job losses that could be avoided by a gradual implementation period. In ensuring that prevailing wage is set at a level where it will not have adverse effect, it is appropriate for the Department to consider whether a significantly higher wage can be immediately absorbed by employers or might have the unintended consequence of reducing the availability of jobs for U.S. workers because the wage would result in some employers going out of business or scaling back their operations. This proposed rule will eventually result in wage increases of greater than one hundred percent to many employers. Given the long history of employers paying a substantially lower wage rate than would be required at the end of the phase-in period under this proposed rule, the Department proposes to set the monthly AEWR initially at 60 percent of the monthly AEWR calculated using the proposed methodology, with incremental increases over the 5-year period following implementation. This proposal is intended to ensure that this rule will not have adverse effect on U.S. workers due to significant job losses. As reflected in the projection charts below, during the first year, employers filing under Subpart C would be subject to monthly AEWRs that are 60 percent of the current USDA hourly AEWRs converted to a monthly rate. Each year thereafter until 2020, the monthly AEWRs applicable to these employers would increase by 10 percent (*i.e.*, 70 percent in 2017; 80 percent in 2018; 90 percent in 2019). Beginning in 2020, the monthly AEWR applicable to the occupations covered under Subpart C would be 100 percent of that year's hourly regional AEWR converted into a monthly rate by multiplying it by 44 hours per week and 4.333 weeks per month.

Wages in Year One will make a significant impact on wage stagnation, and subsequent years will continue to do so. By 2020, the Department anticipates this methodology will have addressed wage stagnation concerns fully. The Department invites comment on other options for determining the monthly AEWRs for these occupations, including other options for phasing in the new methodology.

Finally, the Department is proposing that an employer must offer and pay at least the monthly AEWR established using the adopted wage-setting methodology, unless another applicable wage source reflects a higher threshold wage rate. Specifically, if one of the following wage sources reflects a higher wage rate requirement for the occupation than the monthly AEWR, then the Department proposes the employer must offer and pay at least that wage rate: (1) Specified in an agreed-upon collective bargaining agreement; or (2) imposed by Federal or State law or judicial action. The current TEGs establish that the prevailing wage is the required wage unless there is a State occupation-specific wage rate for sheepherders; no additional wage obligation is imposed on the open range employers. The Department has developed these limited exceptions to account for increases that have occurred in States as a matter of legislative or judicial action. The Department has also opted to account for collective bargaining to permit a higher wage rate requirement where such an agreement exists. Accordingly, the Department proposes that the monthly AEWR determination will be the employer's minimum wage requirement, unless a CBA wage rate or State law or judicially required rate for the occupation is higher.

As always, an employer may choose to offer and pay more than the minimum required. The proposed methodology described in this provision is intended to set a more appropriate minimum wage requirement for employers seeking temporary open range workers through the H-2A program while preventing wage stagnation or regression.

The Department seeks comment on all aspects of the new wage methodology for these occupations. In particular, we seek comment on the proposal to combine open range herding and livestock production into one wage-setting structure, which is predicated on the similarity of the job duties, the nature of the activities, the location and the conditions under which the activities are performed, and the isolated, on-call nature of the

employment. In addition, we particularly seek comment on the proposed wage setting method used to establish a monthly AEWR for these occupations, which, when implemented, will determine the minimum wage an employer must offer, free and clear, without altering other benefits, wages, and working condition obligations (*e.g.*, provision of housing without charge or deposit charge) applicable to these occupations.

#### *D. Variances From Filing, Processing, and Post-Acceptance Procedures*

##### 1. § 655.215 Variances From Filing Procedures

The Department proposes to continue to require employers (whether an individual, an association, or an H-2A Labor Contractor) seeking workers in open range production of livestock and herding occupations to include an attachment listing the locations, estimated start and end dates, and, if applicable, names for each farmer/rancher where work will be performed under the job order when filing an *Application for Temporary Employment Certification*. The locations should be identified with as much specificity as possible in order to apprise potential U.S. workers of where the work will be performed and to ensure recruitment in all areas of intended employment.

The Department proposes to continue to allow employers or employer associations engaged in open range herding and livestock production to file applications and job orders covering work locations in multiple areas of intended employment and within one or more States.<sup>21</sup> This approach is warranted by the unique nature of the herding or production of livestock on the open range, particularly the transient nature of herding or livestock operations, often covering many hundreds of miles. In addition, the Department proposes to continue to allow an association of agricultural employers filing a master application as a joint employer to identify different dates of need for each of its employer-members on the application and job order.<sup>22</sup> Unless a modification to the job order is required by the CO or requested by the employer under 20 CFR 655.121(e), the association with

<sup>21</sup> This would continue the current practice that permits a variance from the geographic scope limitations of 20 CFR 655.132(a) for H-2ALCs engaged in open range herding and livestock production, and from 20 CFR 655.131(b) for master applications that include worksites in more than two contiguous States.

<sup>22</sup> The current guidance provides this variance from the date of need requirement in 20 CFR 655.131(b).

shepherding or goat herding positions will not need to resubmit its job order during the calendar year.

Finally, consistent with 20 CFR 655.103(d) and the history of herding, under the proposal, the total period of need that an employer seeking temporary labor certification for herding on the open range is permitted to state on the application and job order must be no longer than 364 days. The Department seeks comments regarding the temporary and seasonal nature of the work, including the amount of time spent on the open range during a year. The recognition of sheep and goat herding work on the open range has resulted from decades of past practices and draws upon the unique characteristics of the work that cannot be completely addressed within the generally applicable regulatory definition of temporary need; however, the Department seeks comments regarding whether the unique characteristics of the work exist year-round. The Department's long standing special procedures that allow sheep or goat herding employers to participate in the H-2A program with a total period of need lasting up to 364 calendar days have their origins in prior statutory provisions from the 1950s, *see, supra, Sec. I.A.* However, the Department is considering whether to modify this approach if evidence shows that the unique characteristics of sheep or goat herding on the open range do not exist for the entire period of the job order. The issuance of temporary labor certifications in this manner to employers engaged in sheep or goat herding on the open range has historically been based on the idea that the work is unique and, thus, has recognized the peculiarities of the industry and work involved. Thus, as we stated in Section II.A.1, we are seeking information on the seasonal nature as well as the duration of sheep and goat herding.

The proposal retains the 364-day duration of need in sheep and goat herding on the open range and does not expand this approach to applications for temporary open range livestock production occupations, for which an employer must continue to demonstrate a temporary need period of not more than 10 months. Despite similarities between herding and livestock production occupations performed on the open range, experience processing applications indicates that open range production of livestock involves distinct temporary positions at different times of the year. In any case, range livestock employers have been able to operate successfully without needing this

unique benefit for many years. *See, e.g., In the Matter of Vermillion Ranch Limited Partnership*, 2014-TLC-00002 (Dec. 5, 2013). As discussed in *Vermillion*, open range livestock employers may require separate temporary labor certifications for different time periods of the year to accurately reflect the distinct seasonal labor needs of the employer. 2014-TLC-00002, at \*9-10. The Department seeks comments as to whether sheep and goat herding similarly involves distinct temporary positions at different times of the year and should require more than one certification to match the various phases of the herding cycle to reflect temporary need under the INA. In addition, if separate certifications are required, should herding and open range livestock production employers be required to pay the hourly AEWR, as under the regular H-2A requirements, for temporary labor certifications covering time periods at a location other than the open range (*i.e.*, ranch or farm)?

## 2. § 655.220 Variance From Processing Procedures

This section contains the only variances the Department proposes to make from the general filing procedures in Subpart B for eligible employers seeking workers in open range production of livestock and herding occupations. Unless specifically addressed in these provisions, employers must comply, as they do currently, with the processing procedures in 20 CFR 655.140-655.145. The Department is proposing that under § 655.220, when the CO determines that an application and job order meet all regulatory requirements, the CO will notify the employer and transmit a copy of the job order to any one of the SWAs with jurisdiction over the anticipated worksites so that recruitment can begin. Where an association of agricultural employers files a master application as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit the copy of the job order to the SWA with jurisdiction over the association's location. The CO's notification will also direct the SWA receiving the job order copy to place the job order promptly in intrastate and interstate clearance, including forwarding the applications to all States where work will be performed.

Consistent with the OFLC's handling of other job orders approved for an association of agricultural employers filing a master application as a joint employer on behalf of its employer-members, the Department proposes that it will keep the job order posted on the OFLC's electronic job registry until 50

percent of the work contract period has elapsed for all employer-members identified on the job order (*i.e.*, the 50 percent period will be measured based on the employer-member with the last date of need). Since these job orders involve employer-members with different dates of need, each with its own 50 percent mark, this provision provides greater clarity for associations filing as joint employers with respect to the period the job order will appear on the electronic job registry.

## 3. § 655.225 Variances From Post-Acceptance Procedures

The Department is proposing to continue for sheep and goat herding occupations and expand to open range livestock production the practice under the TEGLs of waiving the requirement for placement of an advertisement on two separate days in a newspaper of general circulation as provided under 20 CFR 655.151. Because both open range herding and livestock production cover multiple areas of intended employment in remote, inaccessible areas within one or more States, and where fewer communities have newspapers, the newspaper advertisement is impractical and ineffective for recruiting domestic workers for these types of job opportunities.

Consistent with the OFLC's handling of other job orders approved for an association of agricultural employers filing a master application as a joint employer on behalf of its employer-members, the CO will direct the SWAs to keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the approved job order. The SWA will refer all qualified U.S. workers to the association, with this proposed rule codifying the association's obligation to make every effort to accommodate a U.S. worker's worksite location preference (*e.g.*, the location with an opening nearest to his or her place of residence). In addition, this rule clarifies that an association handling the recruitment requirements for its employer-members must maintain a recruitment report containing the information required by 20 CFR 655.156 in a manner that allows the Department to see the recruitment results for each employer-member identified on the H-2A application and approved job order.

### E. Mobile Housing

#### 1. § 655.230 Use of Mobile Housing

Employers covered under this Subpart may use mobile housing for open range herding and livestock production job

opportunities, as provision of non-mobile housing is not practicable due to the remote locations of the work or terrain. Currently, there are no specific Department of Labor Occupational Safety and Health Administration (OSHA) standards for worker housing on the open range. OSHA's rules for temporary labor camps under 29 CFR 1910.142 are applicable only to workers housed in fixed structures or units. Similarly, the Department's rules for housing temporary agricultural workers under 20 CFR part 654, subpart E (published in the **Federal Register** on March 4, 1980) are only applicable to fixed structures or units and refer back to the OSHA standards in 29 CFR 1910.142 for employer-provided housing for agricultural workers. However, 29 CFR 654.400(b) requires mobile housing on the open range to "meet existing Departmental guidelines." The Department is proposing to codify these guidelines in § 655.235.

Since the mobile housing is often located in remote or isolated areas and is moved frequently, often covering hundreds of miles, the Department proposes continuing its long-standing practice of requiring the SWA to schedule and conduct an inspection of the employer's mobile housing no less frequently than once every 3 years (*i.e.*, 36 months). Based on that inspection, the SWA must provide a certification to the employer for a period lasting no more than 36 months. During the validity period of the SWA's housing certification, the Department will continue to allow employers to self-certify on each new application for certification that its mobile housing continues to meet the guidelines in § 655.235. To self-certify the employer must submit a copy of the SWA's valid housing certification along with a written statement, signed and dated by the employer, assuring the SWA and NPC that the employer's mobile housing continues to comply with all the applicable standards for mobile housing. The NPC may deny the H-2A application in situations where the certification provided by the SWA has expired or the housing does not meet all the applicable standards.

There are times when the mobile housing is temporarily located at or near the ranch or farm (or a similar central location) that has fixed housing for workers for certain operations that are a normal part of the herding cycle, such as birthing, shearing, or branding, and for minor, sporadic, and incidental work within the open range worker's duties. The Department acknowledges that the mobile housing may in such instances

continue to be used, or even be preferred, by workers, even where access to fixed housing exists. In situations in which the workers are temporarily stationed at or near the ranch or farm (reasonably able to return to it each night), the Department proposes that employers do not need to maintain full fixed-site housing for open range workers, but must provide access when employees are at the ranch to toilets, kitchens, and cleaning facilities for both person and clothing, including showers with hot and cold water under pressure. Where workers are temporarily located in employer-provided fixed-site housing at the ranch site, rather than remaining in the worker's mobile unit, such fixed-site housing must meet the standards applicable to such housing under 20 CFR 655.122(d). The Department invites comments about whether the employer must provide the worker a second sleeping facility in a fixed-site housing unit at the ranch or farm or other central location whenever the worker is located there.

## 2. § 655.235 Standards for Mobile Housing

The NPRM, in large measure, proposes to codify the minimum standards historically applied by the Department to mobile housing. These standards are generally consistent with the housing rules for temporary agricultural workers published under 20 CFR part 654, subpart E, but contain adaptations due to the unique circumstances of mobile housing. Because mobile housing for herders requires frequent movement to remote or isolated sites on the open range and must accommodate a very small number of workers, the current housing rules for temporary agricultural workers must be modified. For example, although the Department requires that mobile housing sites be well drained and free from depressions in which water may stagnate, the existing rules under 20 CFR 655.404(c)-(d) concerning the controlling of noxious plants and uncontrolled weeds or brush, as well as provision of space for recreation related to the size of the facility and type of occupancy, cannot practically be enforced due to the topography of the open range and highly mobile nature of the housing. Similarly, although the standards for water supply are consistent with those outlined under 20 CFR 654.405(a) and (c), the requirement under 20 CFR 654.405(b) concerning the provision of a cold water tap within 100 feet of each individual living unit is not feasible due to the remote and highly mobile nature of the housing units.

Finally, the Department proposes guidelines clarifying that, in situations where workers are located in rough or mountainous terrain or where land use regulations may not permit the use of certain kinds of mobile housing, tents may be used as a temporary housing option where the worker's health and safety will not be impaired.

The proposed rule also addresses health and safety concerns for workers living in the mobile housing. Workers must be able to escape from the mobile housing in an emergency, such as a fire. As electricity is not available in open range areas, alternative heating, lighting, and refrigeration or food preservation options are necessary. The Department invites comments related to safe and effective heating and lighting options for open range housing as well as refuse disposal methods that will avoid attracting wildlife. Further, the Department invites comments on food and food preservation options in keeping with food safety and nutrition concerns.

The Department proposes that each worker must have a separate bed, cot, or bunk with a clean mattress. The Department recognizes, however, that an employer must occasionally send a second worker to a remote open range location where only one, single-capacity mobile housing unit is located, and that bringing a second mobile housing unit or tent may not be feasible or appropriate. The second worker may be replacing the first worker, for example, and a short transition time may be necessary during which the workers will share the single-occupancy mobile housing unit. In those cases, the proposed rule codifies the Department's intent to limit the duration of the shared occupancy situation to no more than three consecutive days. Further, the rule proposes continuing the current requirement that, in such a temporary situation, each worker must have a separate bed or bedding (*e.g.*, sleeping bag).

The Department is expanding upon the current standards in a number of areas. For example, the Department is proposing that the employer provide the workers with water in quantities sufficient for basic cooking, consumption, cleaning, laundry and bathing requirements.<sup>23</sup> In WHD investigations, the Department has found employers who do not provide water at all times, and employees who

<sup>23</sup> Current requirements mandate the provision of sufficient water for cooking, drinking and bathing. Therefore, the proposal represents a modest expansion of the existing requirements by adding the obligation to supply water sufficient for cleaning and laundry as well.

were forced to melt snow for drinking water. The water to be used for cooking and consumption must be potable or easily rendered potable and the employee must be provided with the means to do so. Potable water is water that meets the water quality standards for drinking purposes of either the state or local authority having jurisdiction over supplies of drinking water or the U.S. Environmental Protection Agency's National Primary Drinking Water regulations, 40 CFR part 141. This definition mirrors the OSHA field sanitation regulations that define potable water for agricultural establishments, 29 CFR 1928.110. The supply of potable water must also be readily available in order to ensure that the water is available for cooking and consumption when needed by the worker. OSHA requires that drinking water must always be available in amounts needed for satisfying thirst, cooling, waste elimination, and metabolism. Occupational Safety and Health Administration, Field Sanitation, 52 FR 16050, 16087 (May 1, 1987). The Department is also proposing that the employer provide individual drinking cups.

The Department invites comments on the amount of water needed for each worker for these purposes. The Department further seeks comment on how much of the water should be potable (or easily rendered potable) for cooking and consumption and how much water is sufficient for cleaning, laundry, and bathing requirements.

When exigent circumstances make transporting water to remote locations temporarily impossible, the employer must identify an alternative water supply and methods for making water obtained from alternate supplies potable. The employer must provide the employee with the appropriate means for making the water potable. The Department seeks comment on what alternative water supplies may be used when exigent circumstances preclude the employer from transporting water to the worker, as well as what means are available to make alternate water sources potable for cooking and consumption.

The Department is aware that these rules may involve additional expense of providing a sufficient supply of potable water (or water easily rendered potable), but concludes that any additional expense is justified fully given the necessity of making drinkable water available for a vulnerable worker population performing physical labor outdoors, sometimes in extreme weather conditions.

In sum, the Department is proposing to maintain most of the existing requirements that have governed mobile housing for workers engaged in herding and the open range production of livestock for many years. The Department invites comments on all aspects of the standards for mobile housing on the open range as well as appropriate standards for tents, including size, material, accessories (e.g., rainfly and ground cover), and related sleeping units (e.g., thermal sleeping pad and type of sleeping bag).

### III. Administrative Information

#### A. Executive Order 13563 and Executive Order 12866

Executive Order (E.O.) 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under E.O. 12866, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as "economically significant"); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The proposed rule is a significant regulatory action under sec. 3(f) of E.O. 12866.

The economic effects of the costs and transfers that would result from the changes in this proposed rule, above and beyond the impacts of the program as it is currently implemented, are not economically significant. The largest impact on employers will result from implementation of the proposed wage setting methodology, which would be phased in over a 5-year period. This proposal will result in average annual transfers from employers to employees due to increased wages of \$45.08 million between 2016 and 2025, which includes a 5-year phase-in period from 2016 through 2020.<sup>24</sup> For those employers engaged in open range production of livestock other than sheep and goat herding, the proposed rule requires employers to provide food or meals, free of charge, to workers at an average annual cost of \$1.74 million. The special procedures guidance currently in place for open range production of livestock and sheepherding/goat herding require the provision of an adequate and convenient supply of water that meets the standards of the State health authority in sufficient amount to provide for drinking, cooking and bathing. The proposed rule expands the required water supply by including water for cleaning and laundry. In addition, the proposed rule requires that the water used for drinking and cooking be potable or easily rendered potable. The additional costs on employers resulting from this proposed rule include those involved in the provision of water for laundry and cleaning. The average additional annual cost for the employers to provide this water is \$2.97 million, which includes the cost of the potable water, utility trailers, vehicle mileage, and labor to deliver the water and food to workers.<sup>25</sup> The proposed rule includes a requirement that employers provide access to cooking and cleaning facilities when workers are located at or near a fixed-site ranch or farm. As the Department anticipates

<sup>24</sup> To estimate the new wage rates, the Department first calculates the annual percent change in each USDA region's average hourly AEWR for each year from 2009 to 2015. We then take the averages of the resulting six values to estimate the average annual percent changes by USDA region. Using each USDA region's average annual percent change, we forecast the hourly AEWR from 2016 to 2025 for each USDA region. This methodology is described in detail in Section 4: Subject-by-Subject Analysis.

<sup>25</sup> The estimate of \$2.97 million is likely an overestimate based on the fact employers are already required to provide water for drinking, cooking and bathing that meets state health standards.



existing cooking facilities will accommodate the requirement, the anticipated average annual cost to employers for costs related to the provision of cleaning facilities is \$0.36 million. Finally, the cost for the time required to read and review the proposed rule is \$0.01 million per year. Therefore, the average annual cost of the proposed rule is \$5.08 million. The proposed rule involves some cost reductions for employers, primarily for those who will no longer be required to place newspaper advertisements, which range from \$0.09 million to \$0.11 million per year.

#### 1. The Mendoza Litigation and Need for Rulemaking

In *Mendoza, et al. v. Solis et al.*, U.S. workers filed a lawsuit in the U.S. District Court for the District of Columbia challenging the special procedures for shepherding, goat herding, and occupations involved in the production of livestock on the open range, asserting that the Department violated the Administrative Procedure Act (APA) by adopting “special procedures” without first providing notice and an opportunity for public comment. The district court granted a motion to dismiss for lack of standing, but the Court of Appeals for the D.C. Circuit reversed the district court’s dismissal and held that the Department’s TEGLs containing special procedures for herding and production of livestock occupations on the open range constituted legislative rules subject to the APA’s procedural notice and comment requirements.

Through this rulemaking, the Department is complying with an order issued by the district court on remand to remedy the APA violation found by the D.C. Circuit. The lawsuit, however, is only one of the reasons for the promulgation of this Notice of Proposed Rulemaking (NPRM). The unique on-call nature (up to 24 hours a day, 7 days a week) of the work activity in isolated areas associated with these occupations, coupled with the sustained scarcity of U.S. workers employed in herding, has made determining an appropriate prevailing wage increasingly difficult under the current methodology for determining wages for these occupations. In these occupations, the prevailing wage serves as the Adverse Effect Wage Rate (AEWR). Few employers provide U.S. worker wage information in response to prevailing wage survey requests for these occupations, making it difficult for State Workforce Agencies (SWAs) to submit statistically valid prevailing wage findings to the OFLC Administrator. For

example, based on a review of employer surveys conducted over the last three years by approximately 10 States located in the mountain plains/western regions of the United States, all of the SWAs reported a combined total of only 30 (FY 2012), 26 (FY 2013), and 18 (FY 2014) domestic workers performing shepherding; these numbers are insufficient to report statistically reliable wage results by State. Therefore, through this rulemaking, the Department plans to establish a more effective methodology for determining and adjusting a monthly AEWR for these unique occupations that adequately protects U.S. and H-2A workers in these occupations. In addition, DOL has received complaints concerning housing conditions and has found violations of the housing standards in both complaint and directed (non-complaint) investigations. In addition, several cases have been litigated in which workers’ health and safety were at question (*Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1060 (E.D. Wash. 2013) (denying defendants’ motion for summary judgment where plaintiff-shepherders alleged mistreatment, including denied breaks, threats of deportation, inadequate food, and housing that did not meet the minimum health and safety standards); *Camayo v. John Peroulis & Sons Sheep, Inc.*, No. 10-CV-00772-MSK-MJW, 2012 WL 4359086, at \*1 (D. Colo. Sept. 24, 2012) (denying defendant’s motion to dismiss where plaintiff-shepherders alleged severe mistreatment, including lack of food); *In the Matter of: John Peroulis & Sons Sheep, Inc.*, ALJ Case No. 2012-TAE-00004 (appeal pending before ARB) (ALJ upheld DOL’s charges against employer for multiple violations, including lack of adequate housing).

#### 2. Regulatory Alternatives

The Department has considered three alternatives: (1) To make the policy changes contained in the proposed rule in which the wage determination is based on forecasted AEWR values by U.S. Department of Agriculture (USDA) region, which are incrementally phased in over five years; (2) to make the same proposed policy changes contained in the proposed rule in which the wage determination is based on forecasted AEWR values by USDA region, which are incrementally phased in over three years; or (3) to make the policy changes contained in the proposed rule in which the wage determination is based on forecasted AEWR values by USDA region, which do not utilize a phase-in schedule. The Department believes that the first alternative—making the policy

changes contained in the proposed rule using the wage based on forecasted AEWR values by USDA region phased in over five years—will most effectively enable the Department to meet its statutory obligations to determine that there are not sufficient workers available to perform the labor or services requested and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed before the admission of foreign workers is permitted, given these occupations and their unique characteristics that have historically resulted in a limited number of U.S. workers interested in performing these jobs. The new wage methodology will begin to address immediately the stagnation concerns discussed earlier. A phase-in also recognizes that the full wage increase in a single year could lead to significant disruptions that might cause job losses that could be avoided by a gradual implementation period. In ensuring that prevailing wage is set at a level where it will not have adverse effect, it is appropriate for the Department to consider whether a significantly higher wage can be immediately absorbed by employers or might have the unintended consequence of reducing the availability of jobs for U.S. workers because the wage would result in some employers going out of business or scaling back their operations. This proposed rule will eventually result in wage increases of greater than 100 percent to many employers. Given the long history of employers paying a substantially lower wage rate than would be required at the end of the phase-in period, under this proposed rule the Department proposes to set the monthly AEWR initially at 60 percent of the monthly AEWR calculated using the proposed methodology, with incremental increases over the 5-year period following implementation. This proposal is intended to ensure that this rule will not have adverse effect on U.S. workers due to significant job losses. The Department invites comments from the public on these and other possible alternatives to consider with the goal of ensuring that the Final Rule best enables the Department to fulfill its statutory mandate.

#### 3. Economic Analysis

The economic analysis presented below covers herding and open range livestock production occupations. The Department’s economic analysis under this Part (III.A) is strictly limited to meeting the requirements under Executive Orders 12866 and 13563. The



Department did not use the economic analysis under this Part (III.A) as a factor or basis for determining the scope or extent of the Department's obligations or responsibilities under the Immigration and Nationality Act, as amended. Nor did the Department use the economic analysis in this Part (III.A) as a relevant factor relating to any requirement under the Administrative Procedure Act, or any case interpreting the requirements under the Administrative Procedure Act.

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2010 Final Rule and Training and Employment Guidance Letters (TEGLs) 32–10 (*Special Procedures: Labor Certification Process for Employers Engaged in Shepherding and Goatherding Occupations under the H-2A Program*) and 15–06, Change 1, (*Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H-2A Program*), against the benefits and costs associated with the implementation of provisions contained in the proposed rule. We explain how the required actions of employers in herding and open range livestock production occupations are linked to the expected impacts of the proposed rule.

The Department has quantified and monetized the impacts of the proposed rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively and identify which data were not available to quantify the costs. The analysis covers 10 years (2016 through 2025) to ensure it captures all major impacts.<sup>26</sup> When summarizing the benefits, costs, or transfers resulting from specific provisions of the proposed rule, we present the 10-year averages to estimate the typical annual effect or 10-year discounted totals to estimate the present value of the overall effects.

In the remaining sections, the Department first presents a subject-by-subject analysis of the impacts of the proposed rule. We then present a summary of the costs and transfers of the proposed rule, including total impacts over the 10-year analysis period.

#### 4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the following provisions of the proposed rule against the baseline (*i.e.*, the 2010

Final Rule; TEGL 32–10; and TEGL 15–06, Change 1): (a) Proportion/type of work permitted at the ranch (*i.e.*, not on the open range); (b) the new methodology for determining the wages of workers; (c) filing requirements; (d) job order submissions; (e) job order duration; (f) newspaper advertisements; (g) placement of workers on master applications; (h) employer-provided items; (i) meals; (j) potable water; (k) expanded cooking/cleaning facilities; (l) earnings records; and (m) time to read and review the rule.

For each of these subjects, the Department discusses the relevant costs, benefits, and transfers. In addition, we provide a qualitative assessment of transfer payments associated with the increased wages and protections of U.S. workers. Transfer payments, as defined by OMB Circular A–4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional costs or benefits to society.

##### a. Proportion/Type of Work Permitted at the Ranch

The proposed rule codifies certain procedures for employers who apply to the Department to obtain temporary agricultural labor certifications to hire foreign workers to perform herding or production of livestock on the open range. The proposed rule also clarifies the proportion/type of work that is permitted to be performed by workers at the fixed-site ranch. Any job duties performed at a place other than the open range (*e.g.*, a fixed site farm or ranch) must be performed on no more than 50 percent of the workdays in a work contract period, and any additional duties above and beyond the production of livestock must be minor, sporadic, and incidental to the herding or production of livestock, *i.e.* closely and directly related to herding and the production of livestock and be performed on no more than 20 percent of the workdays spent at the ranch in a work contract period. The proposed rule thus clarifies and makes more specific the provision in current TEGL 32–10, which similarly provides that it applies in the unique situation of shepherding, which requires “spending extended periods of time with grazing herds of sheep in isolated mountainous terrain,” and states that workers may perform “other farm or ranch chores related to the production and husbandry of sheep and/or goats on an incidental basis.” As in current TEGL 32–10, the proposed rule states that the work activities must also generally require the workers to be

on call 24 hours per day, 7 days per week. In addition, the work performed in the open range must require the use of mobile housing because the worker is not reasonably able to return to his or her place of residence or the employer-provided fixed-site housing within the same day. However, as discussed previously, the Department is requesting comments regarding the length of time and nature of work performed while at the ranch and whether the ranch work duties should be considered a separate and distinct job from the open range duties, requiring a separate job order.

##### i. Costs

This change represents a cost to herding and open range livestock production employers that have had or will have workers at the ranch for more than 50 percent of the contracted workdays or have had workers perform minor, sporadic, and incidental duties on more than 20 percent of the contracted workdays spent at the ranch. These employers will be excluded from applying for workers pursuant to the special procedures in subpart C unless they commit to complying with the proposed percentage limitations for such workers. The Department is not able to estimate this cost, however, because we do not know how many workers currently spend more than 50 percent of their days working at the farm or ranch, although we believe the number is very small given the typical cycles for months spent on the range. Further, the Department cannot predict the adjustments of employers in response to the 20 percent cap. The Department anticipates that it is likely that affected employers will adjust their practices so that minor, sporadic, and incidental work performed at the employer's fixed-site ranch will be equal to or less than the 20 percent cap. However, as discussed previously, the Department is requesting comments regarding the length of time and nature of work performed while at the ranch and whether the ranch work duties should be considered a separate and distinct job from the open range duties, requiring a separate job order. Also, the Department invites comments regarding possible data sources that could be used to estimate this cost.

##### b. New Methodology for Determining the Wages of Workers

The proposed rule changes the methodology for determining the required wages of herding and open range livestock production workers. The Department proposes for both sets of occupations to establish the required wage by using forecasted AEWR values

<sup>26</sup> For the purposes of the cost-benefit analysis, the 10-year period starts on October 1, 2015.

by USDA region, and incrementally phasing the wages in over the first five years of the analysis period. The Department considered two other alternatives: Using forecasted AEW values by USDA region, which are incrementally phased in over the first

three years of the analysis period; and using forecasted AEW values by USDA region that do not utilize a phase-in schedule. The Department analyzes these alternatives relative to the baseline—the monthly AEW for FY 2014—which is the most recent AEW

data available and which reflects what employers currently are paying. To convert the monthly wage rate to an hourly wage rate, the Department divides the monthly wage rate by 44 hours and 4.333 weeks. Exhibit 1 presents the baseline wages by State.

EXHIBIT 1—BASELINE WAGE—FY 2014 MONTHLY AEW  
[Hourly AEW]

State	Required wage for sheep and goat herders	Required wage for open range livestock production workers
AL	\$750.00 (\$3.93)	N/A
AZ	\$750.00 (\$3.93)	N/A
AR	\$750.00 (\$3.93)	N/A
CA	\$1,600.34 (\$8.39)	N/A
CO	\$750.00 (\$3.93)	\$875.00 (\$4.59)
HI	\$1,422.52 (\$7.46)	N/A
ID	\$750.00 (\$3.93)	\$875.00 (\$4.59)
MO	\$750.00 (\$3.93)	N/A
MT	\$750.00 (\$3.93)	\$875.00 (\$4.59)
NM	\$750.00 (\$3.93)	\$875.00 (\$4.59)
NV	\$800.00 (\$4.20)	\$875.00 (\$4.59)
ND	N/A	\$875.00 (\$4.59)
OK	\$750.00 (\$3.93)	N/A
OR	\$1,227.67 (\$6.44)	\$875.00 (\$4.59)
SD	\$750.00 (\$3.93)	\$875.00 (\$4.59)
TX	\$750.00 (\$3.93)	\$875.00 (\$4.59)
UT	\$750.00 (\$3.93)	\$875.00 (\$4.59)
WA	\$750.00 (\$3.93)	N/A
WY	\$750.00 (\$3.93)	\$875.00 (\$4.59)

Exhibit 2 presents the number and percentage of goat/sheepherding and open range livestock production employers participating in the H-2A program and the State for which they applied for certified H-2A workers. The number of employers is based on the FY 2012 H-2A certification dataset.<sup>27</sup> Note

that each employer is counted once for each State for which the employer applied for workers; some employers applied for workers in multiple States. Hence, Exhibit 2 overstates the number of employers participating in the H-2A herder and open range livestock program. As Exhibit 2 illustrates, sheep

and goat herders are most heavily concentrated in California, Utah, and Colorado, while open range livestock production workers are most heavily concentrated in Colorado, Texas, Utah, and Wyoming.

EXHIBIT 2—NUMBER AND PERCENTAGE OF H-2A EMPLOYERS BY OCCUPATION AND STATE

State	Number of sheep and goat herder employers	Percent of sheep and goat herder employers	Number of open range livestock production employers	Percent of open range livestock production employers
AL	2	0.4		
AZ	50	10.0		
AR	46	9.2		
CA	91	18.2		
CO	66	13.2	37	30.6
HI	2	0.4		
ID	43	8.6	5	4.1
MO	1	0.2		
MT	25	5.0	7	5.8
NM			1	0.8
NV	1	0.2	1	0.8
ND	27	5.4	1	0.8
OK	3	0.6		
OR	15	3.0	1	0.8
SD	4	0.8	1	0.8
TX	10	2.0	25	20.7

<sup>27</sup> The FY 2012 certification dataset provides the most recent data available in a useable form. Data from FY 2013 was not available in a useable form due to the Department's settlement of litigation

regarding prevailing wages during FY 2013:Q1 where the wage offers for many employers certified for H-2A open range workers changed post-certification and, therefore, the existing

administrative did not accurately reflect the actual wage offers for purposes of conducting the analysis. Data for FY 2014 was not yet available in a useable form at the time the analysis was conducted.

EXHIBIT 2—NUMBER AND PERCENTAGE OF H-2A EMPLOYERS BY OCCUPATION AND STATE—Continued

State	Number of sheep and goat herder employers	Percent of sheep and goat herder employers	Number of open range livestock production employers	Percent of open range livestock production employers
UT .....	71	14.2	22	18.2
WA .....	4	0.8	.....	.....
WY .....	38	7.6	20	16.5
Total .....	499	100	121	100

**Note:** The total number of employers by State (620) exceeds the number of actual employers participating in the H-2A herder and open range livestock program (517). This discrepancy is due to some employers submitting applications for certified H-2A workers in multiple States.

1. AEW Values Incrementally Phased In Over Five Years

To estimate the new wage rates, the Department first calculates the annual percent change in each USDA region's average hourly AEW for each year from 2009 to 2015. We then take the averages of the resulting six values to estimate the average annual percent

changes by USDA region. Using each USDA region's average annual percent change, we forecast the hourly AEW for the 5-year phase-in period from 2016 to 2020 for each USDA region. Using the Southeast region as an example, the average annual percent change over the six years is 2.2 percent. The Department applies the 2.2 percent growth rate to the 2015 hourly AEW to obtain the

forecasted 2016 hourly AEW ( $\$10.00 \times 1.022 = \$10.22$ ). We then apply the same 2.2 percent growth rate to the forecasted 2016 hourly AEW to forecast the 2017 hourly AEW ( $\$10.22 \times 1.022 = \$10.44$ ). We repeat this calculation to forecast the hourly AEWs for the remaining years in the analysis period. Exhibit 3 presents the actual and forecasted hourly AEWs for each USDA region.

EXHIBIT 3—ACTUAL AND FORECASTED HOURLY AEWRS BY USDA REGION

USDA Survey region (state)	Actual average hourly AEW							Forecasted hourly AEW				
	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020–2025
Southeast (AL) .....	\$8.77	\$9.11	\$9.12	\$9.39	\$9.78	\$10.00	\$10.00	\$10.22	\$10.44	\$10.67	\$10.91	\$11.15
Annual Percent Change .....	.....	3.90%	0.10%	3.00%	4.20%	2.20%	0.00%	Forecasted hourly AEW calculated using the average annual percent change of 2.2%				
Cornbelt II (MO) .....	\$10.77	\$10.86	\$11.03	\$11.50	\$11.41	\$12.22	\$12.62	\$12.96	\$13.31	\$13.67	\$14.04	\$14.42
Annual Percent Change .....	.....	0.80%	1.60%	4.30%	-0.80%	7.10%	3.30%	Forecasted hourly AEW calculated using the average annual percent change of 2.7%				
Delta (AR) .....	\$8.92	\$9.10	\$8.97	\$9.30	\$9.50	\$9.87	\$10.18	\$10.40	\$10.63	\$10.87	\$11.11	\$11.35
Annual Percent Change .....	.....	2.00%	-1.40%	3.70%	2.20%	3.90%	3.10%	Forecasted hourly AEW calculated using the average annual percent change of 2.2%				
Northern Plains (KS, NE, ND, SD) .....	\$10.39	\$10.66	\$11.52	\$11.61	\$12.33	\$13.41	\$13.59	\$14.22	\$14.87	\$15.55	\$16.27	\$17.02
Annual Percent Change .....	.....	2.60%	8.10%	0.80%	6.20%	8.80%	1.30%	Forecasted hourly AEW calculated using the average annual percent change of 4.6%				
Southern Plains (OK, TX) .....	\$9.27	\$9.78	\$9.65	\$9.88	\$10.18	\$10.86	\$10.35	\$10.55	\$10.75	\$10.95	\$11.16	\$11.37
Annual Percent Change .....	.....	5.50%	-1.30%	2.40%	3.00%	6.70%	-4.70%	Forecasted hourly AEW calculated using the average annual percent change of 1.9%				
Mountain I (ID, MT, WY) .....	\$9.64	\$9.90	\$9.90	\$10.19	\$9.99	\$10.69	\$11.14	\$11.42	\$11.70	\$12.00	\$12.30	\$12.60
Annual Percent Change .....	.....	2.70%	0.00%	2.90%	-2.00%	7.00%	4.20%	Forecasted hourly AEW calculated using the average annual percent change of 2.5%				
Mountain II (CO, NV, UT) .....	\$9.88	\$10.06	\$10.48	\$10.43	\$10.08	\$10.89	\$11.37	\$11.64	\$11.92	\$12.21	\$12.50	\$12.80
Annual Percent Change .....	.....	1.80%	4.20%	-0.50%	-3.40%	8.00%	4.40%	Forecasted hourly AEW calculated using the average annual percent change of 2.4%				
Mountain III (AZ, NM) .....	\$9.82	\$9.71	\$9.60	\$9.94	\$9.73	\$9.97	\$10.54	\$10.67	\$10.79	\$10.92	\$11.06	\$11.19
Annual Percent Change .....	.....	-1.10%	-1.10%	3.50%	-2.10%	2.50%	5.70%	Forecasted hourly AEW calculated using the average annual percent change of 1.2%				
Pacific (OR, WA) .....	\$10.12	\$10.85	\$10.60	\$10.92	\$12.00	\$11.87	\$12.42	\$12.87	\$13.33	\$13.81	\$14.31	\$14.82
Annual Percent Change .....	.....	7.20%	-2.30%	3.00%	9.90%	-1.10%	4.60%	Forecasted hourly AEW calculated using the average annual percent change of 3.6%				
California .....	\$10.16	\$10.25	\$10.31	\$10.24	\$10.74	\$11.01	\$11.33	\$11.53	\$11.74	\$11.95	\$12.17	\$12.39
Annual Percent Change .....	.....	0.90%	0.60%	-0.70%	4.90%	2.50%	2.90%	Forecasted hourly AEW calculated using the average annual percent change of 1.8%				
Hawaii .....	\$11.06	\$11.45	\$12.01	\$12.26	\$12.72	\$12.91	\$12.98	\$13.33	\$13.69	\$14.06	\$14.44	\$14.83
Annual Percent Change .....	.....	3.50%	4.90%	2.10%	3.80%	1.50%	0.50%	Forecasted hourly AEW calculated using the average annual percent change of 2.7%				

The new wage rate determination methodology would be implemented over the first five years of the proposed rule. The Department estimates each region's hourly wage rate for each year of the analysis period as follows:

**EXHIBIT 4—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 1**

Year	Wage rate estimate
2016 ....	60 percent of the forecasted 2016 AEW. R.
2017 ....	70 percent of the forecasted 2017 AEW. R.

**EXHIBIT 4—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 1—Continued**

Year	Wage rate estimate
2018 ....	80 percent of the forecasted 2018 AEW. R.
2019 ....	90 percent of the forecasted 2019 AEW. R.
2020 ....	100 percent of the forecasted 2020 AEW. R.
2021 ....	100 percent of the forecasted 2021 AEW. R.
2022 ....	100 percent of the forecasted 2022 AEW. R.

**EXHIBIT 4—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 1—Continued**

Year	Wage rate estimate
2023 ....	100 percent of the forecasted 2023 AEW. R.
2024 ....	100 percent of the forecasted 2024 AEW. R.
2025 ....	100 percent of the forecasted 2025 AEW. R.

Exhibit 5 presents the phased-in forecasted hourly AEW. R. s for each USDA region under Alternative 1—the proposed 5-year phase-in.

**EXHIBIT 5—FORECASTED HOURLY AEW. R. S BY USDA REGION PHASED IN OVER 5 YEARS**

USDA Region	States included	2016	2017	2018	2019	2020–2025
Southeast .....	AL	\$6.13	\$7.31	\$8.54	\$9.82	\$11.15
Cornbelt II .....	MO	7.78	9.32	10.94	12.64	14.42
Delta .....	AR	6.24	7.44	8.69	10.00	11.35
Northern Plains .....	KS, NE, ND, SD	8.53	10.41	12.44	14.64	17.02
Southern Plains .....	OK, TX	6.33	7.52	8.76	10.04	11.37
Mountain I .....	ID, MT, WY	6.85	8.19	9.60	11.07	12.60
Mountain II .....	CO, NV, UT	6.99	8.35	9.77	11.25	12.80
Mountain III .....	AZ, NM	6.40	7.56	8.74	9.95	11.19
Pacific .....	OR, WA	7.72	9.33	11.05	12.88	14.82
California .....	CA	6.92	8.22	9.56	10.95	12.39
Hawaii .....	HI	8.00	9.58	11.25	13.00	14.83

To convert the hourly wage rate to a monthly wage rate, the Department multiplies the hourly wage rate by 44

hours and 4.333 weeks. Exhibit 6 presents the monthly wage rate by State.

**EXHIBIT 6—FORECASTED MONTHLY AEW. R. S BY STATE PHASED IN OVER 5 YEARS**

State	2016	2017	2018	2019	2020–2025
AL .....	\$1,169.08	\$1,393.93	\$1,628.11	\$1,871.92	\$2,125.67
AZ .....	1,220.15	1,440.59	1,666.15	1,896.91	2,132.97
AR .....	1,190.12	1,419.02	1,657.42	1,905.62	2,163.93
CA .....	1,319.38	1,566.99	1,823.08	2,087.88	2,361.62
CO .....	1,331.84	1,591.11	1,862.05	2,145.08	2,440.63
HI .....	1,524.89	1,827.07	2,144.46	2,477.65	2,827.28
ID .....	1,306.18	1,561.97	1,829.73	2,109.91	2,402.96
MO .....	1,482.59	1,776.40	2,084.98	2,408.93	2,748.86
MT .....	1,306.18	1,561.97	1,829.73	2,109.91	2,402.96
NM .....	1,220.15	1,440.59	1,666.15	1,896.91	2,132.97
NV .....	1,331.84	1,591.11	1,862.05	2,145.08	2,440.63
ND .....	1,626.09	1,984.37	2,372.17	2,791.45	3,244.29
OK .....	1,206.44	1,434.26	1,670.30	1,914.79	2,167.97
OR .....	1,471.89	1,779.02	2,106.36	2,454.96	2,825.93
SD .....	1,626.09	1,984.37	2,372.17	2,791.45	3,244.29
TX .....	1,206.44	1,434.26	1,670.30	1,914.79	2,167.97
UT .....	1,331.84	1,591.11	1,862.05	2,145.08	2,440.63
WA .....	1,471.89	1,779.02	2,106.36	2,454.96	2,825.93
WY .....	1,306.18	1,561.97	1,829.73	2,109.91	2,402.96

Exhibits 7 and 8 present the wage differential between the hourly wage under Alternative 1—the proposed 5-year phase-in—and the baseline by State for sheep and goat herders and open range livestock production workers, respectively. In the case of California, the hourly wage under Alternative 1 is

lower than the baseline wage for the first two years, because State law requires a higher wage than the proposed methodology. In those years, the workers would continue to receive the baseline wage; therefore, no wage differential results. Additionally, the hourly wage differentials for States that

did not have a baseline wage because there were no H–2A workers employed as herders or open range livestock workers are denoted as “N/A.” Note that these values are for informational purposes only and were not used in the analysis.

EXHIBIT 7—HOURLY WAGE DIFFERENTIAL BY STATE FOR SHEEP AND GOAT HERDERS PHASED IN OVER 5 YEARS

State	2016	2017	2018	2019	2020–2025
AL	\$2.20	\$3.38	\$4.61	\$5.88	\$7.22
AZ	2.47	3.62	4.81	6.02	7.25
AR	2.31	3.51	4.76	6.06	7.42
CA			1.17	2.56	3.99
CO	3.05	4.41	5.83	7.32	8.87
HI	0.54	2.12	3.79	5.53	7.37
ID	2.92	4.26	5.66	7.13	8.67
MO	3.84	5.38	7.00	8.70	10.48
MT	2.92	4.26	5.66	7.13	8.67
NM	2.47	3.62	4.81	6.02	7.25
NV	2.79	4.15	5.57	7.06	8.61
ND	N/A	N/A	N/A	N/A	N/A
OK	2.39	3.59	4.83	6.11	7.44
OR	1.28	2.89	4.61	6.44	8.38
SD	4.60	6.47	8.51	10.71	13.08
TX	2.39	3.59	4.83	6.11	7.44
UT	3.05	4.41	5.83	7.32	8.87
WA	3.79	5.40	7.11	8.94	10.89
WY	2.92	4.26	5.66	7.13	8.67

EXHIBIT 8—HOURLY WAGE DIFFERENTIAL BY STATE FOR OPEN RANGE LIVESTOCK PRODUCTION WORKERS PHASED IN OVER 5 YEARS

State	2016	2017	2018	2019	2020–2025
AL	N/A	N/A	N/A	N/A	N/A
AZ	N/A	N/A	N/A	N/A	N/A
AR	N/A	N/A	N/A	N/A	N/A
CA	N/A	N/A	N/A	N/A	N/A
CO	\$2.40	\$3.76	\$5.18	\$6.66	\$8.21
HI	N/A	N/A	N/A	N/A	N/A
ID	2.26	3.60	5.01	6.48	8.01
MO	N/A	N/A	N/A	N/A	N/A
MT	2.26	3.60	5.01	6.48	8.01
NM	1.81	2.97	4.15	5.36	6.60
NV	2.40	3.76	5.18	6.66	8.21
ND	3.94	5.82	7.85	10.05	12.43
OK	N/A	N/A	N/A	N/A	N/A
OR	3.13	4.74	6.46	8.29	10.23
SD	3.94	5.82	7.85	10.05	12.43
TX	1.74	2.93	4.17	5.45	6.78
UT	2.40	3.76	5.18	6.66	8.21
WA	N/A	N/A	N/A	N/A	N/A
WY	2.26	3.60	5.01	6.48	8.01

2. AEWV Values Incrementally Phased in Over Three Years

Under this alternative wage rate determination methodology, the Department estimates each region's hourly wage rate using the same AEWV values presented in Exhibit 3 but uses the following phase-in schedule:

EXHIBIT 9—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 2

Year	Wage rate estimate
2016	60 percent of the forecasted 2016 AEWV.

EXHIBIT 9—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 2—Continued

Year	Wage rate estimate
2017	80 percent of the forecasted 2017 AEWV.
2018	100 percent of the forecasted 2018 AEWV.
2019	100 percent of the forecasted 2019 AEWV.
2020	100 percent of the forecasted 2020 AEWV.
2021	100 percent of the forecasted 2021 AEWV.
2022	100 percent of the forecasted 2022 AEWV.

EXHIBIT 9—WAGE RATE PHASING SCHEDULE FOR ALTERNATIVE 2—Continued

Year	Wage rate estimate
2023	100 percent of the forecasted 2023 AEWV.
2024	100 percent of the forecasted 2024 AEWV.
2025	100 percent of the forecasted 2025 AEWV.

Exhibit 10 presents the phased-in forecasted hourly AEWVs for each USDA region under Alternative 2.

EXHIBIT 10—FORECASTED HOURLY AEWRS BY USDA REGION PHASED IN OVER 3 YEARS

USDA region	States included	2016	2017	2018	2019	2020–2025
Southeast	AL	\$6.13	\$8.36	\$10.67	\$10.91	\$11.15
Cornbelt II	MO	7.78	10.65	13.67	14.04	14.42
Delta	AR	6.24	8.51	10.87	11.11	11.35
Northern Plains	KS, NE, ND, SD	8.53	11.90	15.55	16.27	17.02
Southern Plains	OK, TX	6.33	8.60	10.95	11.16	11.37
Mountain I	ID, MT, WY	6.85	9.36	12.00	12.30	12.60
Mountain II	CO, NV, UT	6.99	9.54	12.21	12.50	12.80
Mountain III	AZ, NM	6.40	8.64	10.92	11.06	11.19
Pacific	OR, WA	7.72	10.66	13.81	14.31	14.82
California	CA	6.92	9.39	11.95	12.17	12.39
Hawaii	HI	8.00	10.95	14.06	14.44	14.83

To convert the hourly wage rate to a monthly wage rate, the Department multiplies the hourly wage rate by 44 hours and 4.333 weeks. Exhibit 11 presents the monthly wage rate by State.

EXHIBIT 11—FORECASTED MONTHLY AEWRS BY STATE PHASED IN OVER 3 YEARS

State	2016	2017	2018	2019	2020–2025
AL	\$1,169.08	\$1,593.06	\$2,035.14	\$2,079.91	\$2,125.67
AZ	1,220.15	1,646.39	2,082.68	2,107.68	2,132.97
AR	1,190.12	1,621.74	2,071.77	2,117.35	2,163.93
CA	1,319.38	1,790.84	2,278.84	2,319.86	2,361.62
CO	1,331.84	1,818.41	2,327.56	2,383.43	2,440.63
HI	1,524.89	2,088.08	2,680.57	2,752.95	2,827.28
ID	1,306.18	1,785.11	2,287.17	2,344.35	2,402.96
MO	1,482.59	2,030.17	2,606.23	2,676.59	2,748.86
MT	1,306.18	1,785.11	2,287.17	2,344.35	2,402.96
NM	1,220.15	1,646.39	2,082.68	2,107.68	2,132.97
NV	1,331.84	1,818.41	2,327.56	2,383.43	2,440.63
ND	1,626.09	2,267.85	2,965.21	3,101.61	3,244.29
OK	1,206.44	1,639.16	2,087.87	2,127.54	2,167.97
OR	1,471.89	2,033.16	2,632.95	2,727.73	2,825.93
SD	1,626.09	2,267.85	2,965.21	3,101.61	3,244.29
TX	1,206.44	1,639.16	2,087.87	2,127.54	2,167.97
UT	1,331.84	1,818.41	2,327.56	2,383.43	2,440.63
WA	1,471.89	2,033.16	2,632.95	2,727.73	2,825.93
WY	1,306.18	1,785.11	2,287.17	2,344.35	2,402.96

Exhibits 12 and 13 present the wage differential between the hourly wage under Alternative 2 and the baseline by State for sheep and goat herders and open range livestock production workers, respectively. In the case of California, the hourly wage under

Alternative 2 was lower than the baseline wage for the first year. The Department assumed that the workers would continue to receive the baseline wage; therefore, no wage differential results. Additionally, the hourly wage differentials for States that did not have

a baseline wage because there were no H–2A workers certified are denoted as “N/A.” Note that these values are for informational purposes only and were not used in the analysis.

EXHIBIT 12—HOURLY WAGE DIFFERENTIAL BY STATE FOR SHEEP AND GOAT HERDERS PHASED IN OVER 3 YEARS

State	2016	2017	2018	2019	2020–2025
AL	\$2.20	\$4.42	\$6.74	\$6.98	\$7.22
AZ	2.47	4.70	6.99	7.12	7.25
AR	2.31	4.57	6.93	7.17	7.42
CA	.....	1.00	3.56	3.77	3.99
CO	3.05	5.60	8.27	8.57	8.87
HI	0.54	3.49	6.60	6.98	7.37
ID	2.92	5.43	8.06	8.36	8.67
MO	3.84	6.71	9.74	10.11	10.48
MT	2.92	5.43	8.06	8.36	8.67
NM	2.47	4.70	6.99	7.12	7.25
NV	2.79	5.34	8.01	8.31	8.61
ND	N/A	N/A	N/A	N/A	N/A
OK	2.39	4.66	7.02	7.23	7.44
OR	1.28	4.22	7.37	7.87	8.38
SD	4.60	7.96	11.62	12.33	13.08

EXHIBIT 12—HOURLY WAGE DIFFERENTIAL BY STATE FOR SHEEP AND GOAT HERDERS PHASED IN OVER 3 YEARS—  
Continued

State	2016	2017	2018	2019	2020–2025
TX .....	2.39	4.66	7.02	7.23	7.44
UT .....	3.05	5.60	8.27	8.57	8.87
WA .....	3.79	6.73	9.88	10.37	10.89
WY .....	2.92	5.43	8.06	8.36	8.67

EXHIBIT 13—HOURLY WAGE DIFFERENTIAL BY STATE FOR OPEN RANGE LIVESTOCK PRODUCTION WORKERS PHASED IN  
OVER 3 YEARS

State	2016	2017	2018	2019	2020–2025
AL .....	N/A	N/A	N/A	N/A	N/A
AZ .....	N/A	N/A	N/A	N/A	N/A
AR .....	N/A	N/A	N/A	N/A	N/A
CA .....	N/A	N/A	N/A	N/A	N/A
CO .....	\$2.40	\$4.95	\$7.62	\$7.91	\$8.21
HI .....	N/A	N/A	N/A	N/A	N/A
ID .....	2.26	4.77	7.41	7.71	8.01
MO .....	N/A	N/A	N/A	N/A	N/A
MT .....	2.26	4.77	7.41	7.71	8.01
NM .....	1.81	4.05	6.33	6.47	6.60
NV .....	2.40	4.95	7.62	7.91	8.21
ND .....	3.94	7.31	10.96	11.68	12.43
OK .....	N/A	N/A	N/A	N/A	N/A
OR .....	3.13	6.07	9.22	9.72	10.23
SD .....	3.94	7.31	10.96	11.68	12.43
TX .....	1.74	4.01	6.36	6.57	6.78
UT .....	2.40	4.95	7.62	7.91	8.21
WA .....	N/A	N/A	N/A	N/A	N/A
WY .....	2.26	4.77	7.41	7.71	8.01

## 3. AEWR Values With No Phase-In

Under this alternative wage rate determination methodology, the Department estimates each region's hourly wage rate using the same AEWR

values presented in Exhibit 3 but does not use a phase-in schedule. To convert the hourly wage rate to a monthly wage rate, the Department multiplies the hourly wage rate by 44 hours and 4.333 weeks. With no phase-in, the monthly

AEWR requirement each year would be 100 percent of that year's hourly AEWR converted to a monthly rate by multiplying the hourly wage rate by 44 hours and 4.333 weeks. Exhibit 14 presents the monthly wage rate by State.

EXHIBIT 14—FORECASTED MONTHLY AEWRs BY STATE  
[No phase-in]

State	2016	2017	2018	2019	2020–2025
AL .....	\$1,948.46	\$1,991.33	\$2,035.14	\$2,079.91	\$2,125.67
AZ .....	2,033.59	2,057.99	2,082.68	2,107.68	2,132.97
AR .....	1,983.54	2,027.17	2,071.77	2,117.35	2,163.93
CA .....	2,198.97	2,238.55	2,278.84	2,319.86	2,361.62
CO .....	2,219.74	2,273.01	2,327.56	2,383.43	2,440.63
HI .....	2,541.48	2,610.10	2,680.57	2,752.95	2,827.28
ID .....	2,176.96	2,231.38	2,287.17	2,344.35	2,402.96
MO .....	2,470.99	2,537.71	2,606.23	2,676.59	2,748.86
MT .....	2,176.96	2,231.38	2,287.17	2,344.35	2,402.96
NM .....	2,033.59	2,057.99	2,082.68	2,107.68	2,132.97
NV .....	2,219.74	2,273.01	2,327.56	2,383.43	2,440.63
ND .....	2,710.14	2,834.81	2,965.21	3,101.61	3,244.29
OK .....	2,010.74	2,048.94	2,087.87	2,127.54	2,167.97
OR .....	2,453.14	2,541.46	2,632.95	2,727.73	2,825.93
SD .....	2,710.14	2,834.81	2,965.21	3,101.61	3,244.29
TX .....	2,010.74	2,048.94	2,087.87	2,127.54	2,167.97
UT .....	2,219.74	2,273.01	2,327.56	2,383.43	2,440.63
WA .....	2,453.14	2,541.46	2,632.95	2,727.73	2,825.93
WY .....	2,176.96	2,231.38	2,287.17	2,344.35	2,402.96

Exhibits 15 and 16 present the wage differential between the hourly wage under Alternative 3 and the baseline by State for sheep and goat herders and

open range livestock production workers, respectively. The hourly wage differentials for States that did not have a baseline wage are denoted as “N/A.”

Note that these values are for informational purposes only and were not used in the analysis.

EXHIBIT 15—HOURLY WAGE DIFFERENTIAL BY STATE FOR SHEEP AND GOAT HERDERS  
[No phase-in]

State	2016	2017	2018	2019	2020–2025
AL	\$6.29	\$6.51	\$6.74	\$6.98	\$7.22
AZ	6.73	6.86	6.99	7.12	7.25
AR	6.47	6.70	6.93	7.17	7.42
CA	3.14	3.35	3.56	3.77	3.99
CO	7.71	7.99	8.27	8.57	8.87
HI	5.87	6.23	6.60	6.98	7.37
ID	7.48	7.77	8.06	8.36	8.67
MO	9.03	9.38	9.74	10.11	10.48
MT	7.48	7.77	8.06	8.36	8.67
NM	6.73	6.86	6.99	7.12	7.25
NV	7.45	7.73	8.01	8.31	8.61
ND	N/A	N/A	N/A	N/A	N/A
OK	6.61	6.81	7.02	7.23	7.44
OR	6.43	6.89	7.37	7.87	8.38
SD	10.28	10.94	11.62	12.33	13.08
TX	6.61	6.81	7.02	7.23	7.44
UT	7.71	7.99	8.27	8.57	8.87
WA	8.93	9.40	9.88	10.37	10.89
WY	7.48	7.77	8.06	8.36	8.67

EXHIBIT 16—HOURLY WAGE DIFFERENTIAL BY STATE FOR OPEN RANGE LIVESTOCK PRODUCTION WORKERS  
[No phase-in]

State	2016	2017	2018	2019	2020–2025
AL	N/A	N/A	N/A	N/A	N/A
AZ	N/A	N/A	N/A	N/A	N/A
AR	N/A	N/A	N/A	N/A	N/A
CA	N/A	N/A	N/A	N/A	N/A
CO	\$7.05	\$7.33	\$7.62	\$7.91	\$8.21
HI	N/A	N/A	N/A	N/A	N/A
ID	6.83	7.11	7.41	7.71	8.01
MO	N/A	N/A	N/A	N/A	N/A
MT	6.83	7.11	7.41	7.71	8.01
NM	6.08	6.20	6.33	6.47	6.60
NV	7.05	7.33	7.62	7.91	8.21
ND	9.63	10.28	10.96	11.68	12.43
OK	N/A	N/A	N/A	N/A	N/A
OR	8.28	8.74	9.22	9.72	10.23
SD	9.63	10.28	10.96	11.68	12.43
TX	5.96	6.16	6.36	6.57	6.78
UT	7.05	7.33	7.62	7.91	8.21
WA	N/A	N/A	N/A	N/A	N/A
WY	6.83	7.11	7.41	7.71	8.01

i. Transfers

The proposed wage determination methodology and the two alternatives will each result in an increase in wages paid to H-2A workers and workers in corresponding employment, which represents a transfer from herding and open range livestock production employers.<sup>28</sup>

1. Transfers Using the Forecasted AEWR Incrementally Phased In Over Five Years

To estimate the transfer, the Department first subtracts the appropriate 2014 monthly AEWR value (i.e., the baseline as reflected in Exhibit 1) from the phased-in monthly AEWR to estimate the increase in monthly wages for each open range livestock production and shepherding/goat herding job certified in FY 2012.<sup>29</sup> Next,

we calculate the average increase in monthly wages across all records in the certification dataset. We then convert the average increase in monthly wages per worker to the average increase in hourly wages per worker by dividing the

from FY 2013 was not available in a useable form due to the Department’s settlement of litigation regarding prevailing wages during FY 2013:Q1 where the wage offers for many employers certified for H-2A open range workers changed post-certification and, therefore, the existing administrative did not accurately reflect the actual wage offers for purposes of conducting the analysis. Data for FY 2014 was not yet available in a useable form at the time the analysis was conducted.

<sup>28</sup> For the purpose of this analysis, H-2A workers are considered non-residents.

<sup>29</sup> The FY 2012 certification dataset provides the most recent data available in a useable form. Data



average increase in monthly wages per worker by the number of weeks in a month (4.333) as well as by the number of hours in a full-time workweek (44). Exhibit 17 presents the average increase in monthly and hourly wages per worker under Alternative 1—the proposed 5-year phase-in.

**EXHIBIT 17—AVERAGE INCREASE IN MONTHLY AND HOURLY WAGES PER WORKER FOR ALTERNATIVE 1**

Year	Monthly increase	Hourly increase
	A	b = a/4.333/44
2016 .....	\$515.66	\$2.70
2017 .....	771.28	4.05
2018 .....	883.09	4.63
2019 .....	1,159.61	6.08
2020 .....	1,447.96	7.59
2021 .....	1,447.96	7.59
2022 .....	1,447.96	7.59
2023 .....	1,447.96	7.59
2024 .....	1,447.96	7.59
2025 .....	1,447.96	7.59

The Department multiplies the average increase in hourly wages per H-2A worker under this wage determination option in 2016 (\$2.70) by the number of hours in a full-time workweek (44) and the average duration of need (50 weeks) to obtain the total increase per H-2A worker in 2016 (\$5,950). We then multiply the total increase per worker by the number of H-2A certified workers<sup>30</sup> to obtain total transfer due to increased wages of \$17.4 million in 2016. We repeat this calculation for each year of the analysis period using the average increases in hourly wages shown in Exhibit 17. Using an annual growth rate of two percent, the Department estimates that there will be 2,929 H-2A workers certified in 2016, which it estimates will increase to 3,500 in 2025. This results in an average annual transfer payment of \$45.1 million. The Department invites comments from the public on its

<sup>30</sup> Using the number of H-2A workers certified may be an overestimate of the number of affected workers. Employers do not bring into the country all the workers for which they are certified each year, and the workers do not all stay for the entire period of the certification. However, there likely are some corresponding workers who would also receive the increased wages. In some cases, the Department estimates the number of affected workers using the approximate number of H-2A workers per employer. For example, in FY 2012, there were 2,706 H-2A affected workers certified on 1,013 applications for 517 estimated unique employers. The Department could approximate the average number of H-2A workers per small entity by dividing the total number of certified H-2A workers in FY 2012 (2,706) by the total number of certified applications (1,013) to derive the estimate of approximately 3 H-2A workers per small entity (2,706/1,013).

calculation of the number of affected workers using the number of H-2A workers certified.

**2. Transfers Using the Forecasted AEWI Incrementally Phased In Over Three Years**

To estimate the transfer under the alternative wage option using a 3-year phase-in, the Department first subtracts the appropriate 2014 monthly AEWI value (*i.e.*, the baseline) from the phased monthly AEWI to estimate the increase in monthly wages for each record in the certification dataset for FY 2012. Next, we calculate the average increase in monthly wages across all records in the certification dataset. We then convert the average increase in monthly wages per worker to the average increase in hourly wages per worker by dividing the average increase in monthly wages per worker by the number of weeks in a month (4.333) as well as by the number of hours in a full-time workweek (44). Exhibit 18 presents the average increase in monthly and hourly wages per worker under Alternative 2.

**EXHIBIT 18—AVERAGE INCREASE IN MONTHLY AND HOURLY WAGES PER WORKER FOR ALTERNATIVE 2**

Year	Monthly increase	Hourly increase
	a	b = a/4.333/44
2016 .....	\$515.66	\$2.70
2017 .....	841.92	4.42
2018 .....	1,341.27	7.04
2019 .....	1,393.97	7.31
2020 .....	1,447.96	7.59
2021 .....	1,447.96	7.59
2022 .....	1,447.96	7.59
2023 .....	1,447.96	7.59
2024 .....	1,447.96	7.59
2025 .....	1,447.96	7.59

The Department multiplies the average increase in hourly wages per worker in 2016 (\$2.70) by the number of hours in a full-time workweek (44 hours) and the average duration of need (50 weeks) to obtain the total increase per worker (\$5,950). We then multiply the total increase per worker by the number of H-2A workers certified in 2016 (2,929) to obtain a total transfer in 2016 of \$17.4 million. We repeat this calculation for each remaining year of the analysis period using the average increases in hourly wages shown in Exhibit 18. Using an annual growth rate of two percent, the Department estimates that there will be 2,929 H-2A workers certified in 2016, which it estimates will increase to 3,500 in 2025. This results an average annual transfer

payment due to increased wages of \$47.8 million.

**3. Transfers Using the Forecasted AEWI With No Phase-In**

To estimate the transfer under the alternative wage option using no phase-in, the Department first subtracts the appropriate 2014 monthly AEWI value (*i.e.*, the baseline) from the monthly AEWI to estimate the increase in monthly wages for each record in the certification dataset for FY 2012. Next, we calculate the average increase in monthly wages across all records in the certification dataset. We then convert the average increase in monthly wages per worker to the average increase in hourly wages per worker by dividing the average increase in monthly wages per worker by the number of weeks in a month (4.333) as well as by the number of hours in a full-time workweek (44). Exhibit 19 presents the average increase in monthly and hourly wages per worker under Alternative 3.

**EXHIBIT 19—AVERAGE INCREASE IN MONTHLY AND HOURLY WAGES PER WORKER FOR ALTERNATIVE 3**

Year	Monthly increase	Hourly increase
	a	b = a/4.333/44
2016 .....	\$1,239.56	\$6.50
2017 .....	1,289.81	6.77
2018 .....	1,341.27	7.04
2019 .....	1,393.97	7.31
2020 .....	1,447.96	7.59
2021 .....	1,447.96	7.59
2022 .....	1,447.96	7.59
2023 .....	1,447.96	7.59
2024 .....	1,447.96	7.59
2025 .....	1,447.96	7.59

The Department multiplies the average increase in hourly wages per worker in 2016 (\$6.50) by the number of hours in a full-time work (44) week and the average duration of need (50 weeks) to obtain the total increase per worker (\$14,304) in 2016. We then multiply the total increase per worker by the number of H-2A workers certified in 2016 (2,929) to obtain a total transfer in 2016 of \$41.9 million. We repeat this calculation for each remaining year of the analysis period using the average increases in hourly wages shown in Exhibit 19. Using an annual growth rate of two percent, the Department estimates that there will be 2,929 H-2A workers certified in 2016, which it estimates will increase to 3,500 in 2025. This results in an average annual transfer payment due to increased wages of \$51.8 million.

The increase in the wage rates for some workers represents an important transfer from agricultural employers to corresponding U.S. workers, not just H-2A workers. As noted previously, the higher wages for workers associated with the new methodology for estimating the AEWR will result in an improved ability on the part of workers and corresponding U.S. workers and their families to meet their costs of living and spend money in their local communities. On the other hand, higher wages represent an increase in costs of production from the perspective of employers that affects economic profit and, on the margin, creates a disincentive to hire H-2A and corresponding U.S. workers. The Department does not have sufficient information to measure the net effect of these countervailing impacts.

There also may be a transfer of costs from government entities to employers as a result of lower expenditures on unemployment insurance benefits claims. Previously unemployed individuals who were not willing to accept a job at the lower wage may now be willing to accept the job and would not need to seek new or continued unemployment insurance benefits. The Department, however, is not able to quantify these transfer payments with precision.

The Department invites comments regarding the assumptions and data sources used to estimate the value of these wage transfers.

#### c. Job Order Submissions

The proposed rule extends the waiver of job order filing requirements in 20 CFR 655.121(a) through (d) to employers of H-2A workers in open range livestock production occupations. The Department is proposing that a covered employer will submit its job order, *Agricultural and Food Processing Clearance Order*, Form ETA 790, directly to the National Processing Center (NPC), not to the State Workforce Agency (SWA). The employer will submit the job order to the NPC at the same time it submits its *Application for Temporary Employment Certification*, Form ETA 9142A, as outlined in 20 CFR 655.130.

This provision does not represent a change for an association filing a master application as joint employer with its employer-members for sheep or goat herding positions. However, to ensure consistency in the handling of all employers eligible to use these special procedures, the Department is proposing to extend this existing practice to all employers involved in

open range herding and livestock production.

#### i. Cost Reductions

This change represents a minor cost reduction to employers of H-2A workers in open range livestock production occupations who will no longer be required to prepare and send a separate ETA Form 790 submission to the SWA and then communicate directly with the SWA about any concerns the SWA raises with the ETA Form 790. Due to data limitations, however, the Department is not able to quantify the staff time and resource costs saved relative to the baseline in which form submission and communication with the SWA is required. The Department invites comments regarding possible data sources regarding the staff time and resource costs saved that could be used to estimate this cost reduction.

#### d. Filing Requirements

The proposed rule permits an association of agricultural employers filing as a joint employer to submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States with different start dates of need.

This provision does not represent a change for an association filing a master application as joint employer with its employer-members for sheep or goat herding positions. However, to ensure consistency in the handling of all employers eligible to use these special procedures, the Department is proposing to extend this existing practice to employers in the herding or production of other livestock.

#### i. Cost Reductions

This change represents a minor cost reduction to employers of H-2A workers in open range livestock production occupations that file a master application as joint employer with its employer-members. Due to data limitations regarding the time savings realized by filing a master application relative to separate applications and the extent to which open range livestock production employers would file master applications as joint employers with their employer-members, however, the Department is not able to quantify this impact. The Department invites comments regarding possible data sources regarding the time savings realized by filing a master application relative to separate applications and the extent to which open range livestock production employers would file master

applications that could be used to estimate this cost reduction.

#### e. Job Order Duration

The proposed rule requires that, where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, each of the SWAs to which the job order was transmitted by the Contracting Officer (CO) or the SWA having jurisdiction over the location of the association must keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order, and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity. The proposed rule also requires that the Department keep the job order posted on the OFLC electronic job registry for the same period.

#### i. Cost Reductions

This change represents a possible cost reduction for an H-2A employer association that files a master application as a joint employer with its employer-members for workers in sheep and goat herding occupations. These employers were previously required to accept referrals throughout the work contract period. Under the proposed rule, these employers will only have to accept referrals for 50 percent of the work contract period, resulting in avoided costs of accepting referrals during the second half of the work contract period. Due to data limitations regarding the number of referrals during the second half of the work contract period, however, the Department is not able to quantify this impact. The Department invites comments regarding possible data sources regarding the number of referrals that could be used to estimate this cost reduction.

#### f. Newspaper Advertisements

The Department is proposing to continue for sheep and goat herding occupations and expand to production of livestock occupations on the open range the TEGL practice of granting a waiver of the requirement to place an advertisement on two separate days in a newspaper of general circulation serving the area of intended employment. Because both herding and production of livestock on the open range cover multiple areas of intended employment in remote, inaccessible areas within one or more States, the newspaper advertisement is impractical and ineffective for recruiting domestic

workers for these types of job opportunities.

#### i. Cost Reductions

This change represents a cost reduction to employers of workers in open range livestock production occupations. The Department estimates this cost reduction by multiplying the estimated number of applications filed by open range livestock production employers in 2016 (157) by the average cost of placing a newspaper advertisement (\$258.64) and the number of advertisements per employer (2).<sup>31</sup> We repeat this calculation for each remaining year of the analysis period. Using an annual growth rate of two percent, the Department estimates that 157 applications will be filed by open range livestock production employers in 2016, which it estimates will increase to 188 applications filed in 2025. This results in an average annual cost reduction of \$0.09 million.

Because these activities require time on the part of a human resources manager on the ranch, we add to the result the incremental cost of preparing the advertisement, which we calculate by multiplying the estimated number of applications filed by open range livestock production employers in 2016 (157) by the time required to prepare a newspaper advertisement (0.5 hours), the hourly labor compensation rate of a human resources manager at an agricultural business (\$75.90), and the number of advertisements per employer (2).<sup>32</sup> Using the projected number of applications, we repeat the above calculation for each remaining year of the analysis period to obtain an average annual cost reduction of \$0.01 million.

In total, the cost reduction from not having to place the advertisement and saved labor yield an average annual cost reduction of \$0.1 million. The Department invites comments regarding the assumptions and data sources used to estimate the value of this cost reduction.

#### g. Placement of Workers on Master Applications

The proposed rule requires that eligible U.S. workers who apply for the

<sup>31</sup> This newspaper advertisement cost estimate is based on an advertisement of 158 words placed in *The Salt Lake Tribune* for one day (Source: *The Salt Lake Tribune*. Available at <http://placead.yourutahclassifieds.com/webbase/en/std/jsp/WebBaseMain.do>. Accessed Nov. 13, 2014).

<sup>32</sup> The Department estimates that this work would be performed by a human resources manager at an agricultural employer at an hourly rate of \$53.45 (as published by the Department's OES Survey, O\*Net Online), which we multiply by 1.42 to account for employee benefits to obtain a total hourly labor cost of \$75.90.

job opportunities and are hired be placed at the locations nearest to them, absent a request for a different location by U.S. workers. The proposed rule also requires that associations that fulfill the recruitment requirements for their members maintain a written recruitment report for each individual employer-member identified in the application or job order, including any approved modifications.

#### i. Cost Reductions and Costs

The U.S. worker placement requirement represents a minor cost reduction. Because U.S. workers will be placed at locations nearest to them, the proposed rule will yield a decrease in travel costs to arrive at and return from the work site. Due to data limitations regarding travels costs to arrive at and return from the work site for participating U.S. workers, however, the Department is not able to quantify this impact with any certainty. The Department invites comments regarding possible data sources regarding travel costs to arrive at and return from the work site for participating U.S. workers that could be used to estimate this cost reduction.

The recruitment report requirement represents a cost to an association of employers of workers in open range livestock occupations. Associations will be required to maintain a written recruitment report for each individual employer-member; however, associations are currently required to document all applications and their disposition, making this a change in the form of the recordkeeping rather than its substance. The Department invites comment on whether there is an increased burden as a result of this requirement. This will likely lead to a marginal increase in costs for the association to prepare and maintain a more detailed recruitment report for each employer-member named on a master application. The Department is not able to quantify this impact with any certainty, however, due to data limitations regarding the time required for associations to prepare and maintain a more detailed recruitment report. The Department invites comments regarding possible data sources that could be used to estimate this additional cost.

#### h. Employer-Provided Items

This provision requires that all herding and open range livestock production employers seeking temporary workers through the H-2A program must provide to their workers, free of charge, all tools, supplies, and equipment required to perform the

duties assigned. The Department is proposing that the job offer specify that the employer will provide, without charge or deposit charge, those tools, supplies, and equipment required by law, by the employer, or by the nature of the work to do the job safely and effectively. Because of the isolated nature of these occupations, an effective means of communication between worker and employer—to enable the employer to check the worker's status and the worker to communicate an emergency to persons capable of responding—is required because it is necessary to perform the job safely and effectively. The workers' location may be so remote that electronic communication devices may not work at all times. Where the employer will not otherwise make contact with the worker (e.g., when delivering food or checking on the worker and herd in-person), the employer must establish a regular schedule when the workers will be geographically located in a place where the electronic communication device will function (e.g., mobile phone in an area with adequate reception) so that the workers' safety and needs can be monitored.

#### i. Costs

This change represents a possible minor cost to herding or open range livestock production employers. The requirement that employers establish a regular schedule when the workers will be located in a place where the electronic communication device will work may impose restrictions on land use or the purchase of particular types of communication devices. The Department cannot, however, predict this impact or quantify it as a cost to employers. The Department invites comments regarding how this provision may impose a cost on employers and how that cost may be estimated, given the existing requirement in the TEGs for an effective means of communicating in case of an emergency and the employers' normal methods of communicating with and visiting their workers.

#### i. Meals

All H-2A employers must provide either three meals a day or free and convenient kitchen facilities. Currently, as required under the sheep and goat herding TEG and pursuant to practice in the industry for open range production of livestock occupations, employers with these open range occupations provide food, free of charge, to their workers in the field. We are proposing to adopt this common practice as a requirement for both

employers engaged in herding and those engaged in the production of livestock on the open range and to require employers to disclose it in the job offer.

#### i. Costs

Because this is a requirement of the sheep and goat herding TEGL, this provision does not represent a cost to sheep and goat herding employers. This provision does, however, represent a cost to open range livestock production employers. The Department estimates this cost by multiplying the number of meals required per worker on a weekly basis (21), the average cost of a meal (\$3.86), and the average duration of need (50 weeks) to obtain the total cost of meals per worker (\$4,053).<sup>33</sup> We then multiply the total cost of meals per worker by the estimated number of open range livestock production employers in 2016 (131) and the average number of H-2A workers per employer needing meals on a weekly basis (3) to obtain a total cost in 2016 of \$1.6 million. We repeat the above calculation for each remaining year of the analysis period. Using an annual growth rate of two percent, the Department estimates that there will be 131 open range livestock production employers in 2016, which it estimates will increase to 157 in 2025. This results in an average annual cost due to meals of \$1.7 million.

In addition to the cost incurred by open range livestock production employers to purchase food, open range livestock production employers would incur costs to transport the food to the workers. The Department assumes that food would be transported to the workers on a weekly basis along with the potable water. The costs related to transporting food and potable water are accounted for below in the section on costs related to potable water. The Department invites comments regarding the assumptions and data sources used to estimate the value of this cost.

#### j. Potable Water

The proposed rule requires that employers provide to workers an adequate supply of water for drinking, cooking, bathing, cleaning and laundry that complies with State or local health standards of which cooking and drinking water must also be potable, or easily rendered potable. The proposed rule expands upon the current TEGLs, which require sufficient water that

meets the standards of the State health authority for drinking, cooking, and bathing, by requiring employers also to provide sufficient water for cleaning and laundry. In addition it requires that drinking and cooking water be potable or easily rendered potable.

#### i. Costs

This change represents a cost to herding and open range livestock production employers. The Department estimates the cost of providing potable water to workers as the sum of the cost of the potable water, the cost of purchasing utility trailers to transport the water and meals, the cost of mileage for the vehicles transporting the water and meals, and the labor costs to transport the water and meals.

The Department estimates the cost of purchasing the water by multiplying the estimated number of employers in 2016 (560) by the average number of H-2A workers per employer needing potable water on a weekly basis (3), the number of gallons of potable water needed per worker on a weekly basis (28), the average cost of a gallon of potable water (\$0.005), and the average duration of need (50 weeks).<sup>34</sup> This results in a cost of \$0.01 million in 2016. We repeat this calculation for each remaining year of the analysis period. Using an annual growth rate of two percent, the Department estimates that there will be 560 employers in 2016, which it estimates will increase to 669 in 2025. This results in an average annual cost of \$0.01 million.

Because the employers must have the means to transport the potable water and food to the workers, the Department estimates the cost of purchasing utility trailers. We assume that 10 percent of agricultural employers do not currently have a trailer sufficient to transport the water and food to workers. In the first year of the rule, we include the cost incurred by existing and new H-2A employers to purchase trailers; in future years, we include the cost incurred only by new participants. To calculate the cost for the first year of the proposed rule, we estimate the number of existing H-2A participants that would need to purchase a trailer in 2016, which we calculate by multiplying the number of existing participants (560) by the assumed percentage of employers that would need to purchase a trailer (10%).

We then multiply the number of employers needing to purchase a trailer (56) by the average cost of a trailer (\$838.34) to estimate the total cost of purchasing utility trailers in 2016 (\$46,971).<sup>35</sup> We repeat this calculation for each remaining year in the analysis time period using the following numbers of new participants: 11 in years 2017–2018, 12 in years 2019–2022, and 13 in years 2023–2025. This calculation results in an average annual cost of \$5,613. The Department also estimates the cost of mileage on the employers' vehicles. We estimate this cost by multiplying the estimated number of employers in 2016 (560) by the average cost per mile of owning and operating an automobile (\$0.59), the number of miles driven (roundtrip) to deliver the water and meals (100), and the number of roundtrips expected per year (50).<sup>36</sup> This calculation results in a cost of \$1.7 million in 2016. We repeat this calculation for each remaining year of the analysis period. Using an annual growth rate of two percent, the Department estimates that there will be 560 employers in 2016, which it estimates will increase to 669 in 2025. This results in an average annual cost of \$1.8 million.

Because these activities require time on the part of an agricultural worker on the ranch, the Department estimates the cost of transporting the potable water and food to the workers, which we calculate by multiplying the estimated number of employers in 2016 (560) by the assumed time required to transport the potable water and food (2.86 hours), the hourly labor compensation rate of an agricultural worker (\$13.01), and the number of roundtrips per year (50).<sup>37</sup>

<sup>35</sup> This trailer cost estimate is based on the average costs for a 5 x 8 ft. utility trailer from Tractor Supply Co. (Source: <http://www.tractor-supply.com/en/store/search/utility-trailers>. Accessed Nov. 13, 2014), Lowes, and Home Depot.

<sup>36</sup> This cost per mile of owning and operating an automobile is based on the average costs in the DOT Bureau of Transportation Statistics. (source: [http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/national\\_transportation\\_statistics/html/table\\_03\\_17.html](http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/national_transportation_statistics/html/table_03_17.html). Accessed Nov. 13, 2014). The Department assumes the workers are all located within the 100-mile roundtrip distance so only one roundtrip per employer per week would be needed to transport water and meals to workers.

<sup>37</sup> The Department assumes that the water delivery will be performed by an agricultural worker at an hourly rate of \$9.16 (as published by the Department's OES Survey, O\*Net Online), which we multiply by 1.42 to account for employee benefits to obtain a total hourly labor cost of \$13.01. The time required to transport the potable water and meals roundtrip was estimated using the assumptions that a roundtrip is 100 miles and that the agricultural worker would drive at 35 mph. The Department assumes the workers are all located within the 100-mile roundtrip distance, so only one roundtrip per employer per week would be needed to transport water and meals to workers.

<sup>33</sup> The meal cost estimate of \$3.86 is from *Allowable Meal Charges and Reimbursements for Daily Subsistence* published by the U.S. Department of Labor, Employment & Training Administration (Source: [http://www.foreignlaborcert.doleta.gov/meal\\_travel\\_subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm). Accessed Dec. 8, 2014).

<sup>34</sup> This potable water cost estimate is from the *2014 Water and Wastewater Survey* produced by the Texas Municipal League (Source: <http://www.tml.org/surveys>. Accessed Nov. 13, 2014). It is estimated based on the average cost of potable water for commercial entities in Texas cities with a population below 2,000 and based on the fee for 50,000 gallons.

This calculation results in a cost of \$1.0 million in 2016. We repeat this calculation for each year of the analysis period. Using an annual growth rate of two percent, the Department estimates that there will be 560 employers in 2016, which it estimates will increase to 669 in 2025. This results in an average annual cost of \$1.1 million.

This calculation yields an average annual cost of \$3.0 million for the cost of the water, utility trailers, vehicle mileage, and labor to deliver the water and food.

The Department has considered several alternatives in addition to the methodology presented above. While the estimation methodology described above produces an overestimate because it assumes that no herding or open range livestock production employers are currently delivering water or food to their workers and that some herding and open range livestock production employers will be required to purchase trailers to transport the water to workers in remote locations, we also considered the scenario in which herding and open range livestock production employers already deliver supplies to workers and simply add the additional potable water to the bed of a truck already owned by the ranch. This alternative scenario would yield a cost estimate that does not include the full roundtrip cost of mileage on the truck or the purchase of a trailer. This methodology would, however, include a cost incurred due to the decreased fuel efficiency of the truck because of the weight of the water in the bed of the truck. The Department invites comments regarding which of these scenarios is more likely to occur.

#### k. Expanded Cooking/Cleaning Facilities

The Department recognizes that there are times when the mobile housing is located at or near the ranch or farm (or a similar central location) that has fixed housing for workers for certain operations that are a normal part of the herding cycle, such as birthing (in some cases), shearing, or branding. We acknowledge that the mobile housing may in such instances continue to be used, or even preferred, by workers, even where access to fixed housing exists.

Where a worker continues to use the mobile housing provided for open range work while temporarily stationed at or near the ranch, the proposed rule obligates the herding or open range livestock production employer to provide the workers with access to facilities such as toilets and showers with hot and cold water under pressure. Similarly, the workers must be provided

access to cooking and cleaning facilities. Herding and open range livestock production employers do not need to maintain full housing in such cases, but must provide access to toilets, kitchens, and cleaning facilities for both person and clothing.

#### i. Costs

The Department expects that farm kitchens will be able to increase production to a sufficient extent to provide for the additional workers; thus, we do not anticipate herding and open range livestock production employers incurring a cost for constructing or expanding cooking facility space.

The requirement to provide access to cleaning facilities, however, will likely impose a cost on herding and open range livestock production employers that do not have cleaning facilities for worker use. This change represents a cost to employers. To estimate the cost of constructing or expanding the cleaning facilities for the first year of the proposed rule, the Department estimates the number of existing H-2A participants that would need to construct/expand cleaning facilities, which we calculate by multiplying the number of existing H-2A participants (560) by the assumed percentage of employers that would need to construct or expand their facilities (20%). We then multiply the number of existing employers that would need to construct/expand facilities (112) by the average cost per square foot to construct or expand cleaning facilities (\$270.00) and the assumed size of the cleaning facility (100 sq. ft.).<sup>38</sup> This calculation results in a cost of \$3.0 million in 2016.

We repeat this calculation for each of the remaining years using the following numbers of new participants: 11 in years 2017–2018, 12 in years 2019–2022, and 13 in years 2023–2025. Over the 10-year period, this calculation yields an average annual cost of \$0.4 million to existing and new employers.

The Department invites comments regarding the assumptions used for the average size of the cleaning facilities to be constructed or expanded and the average cost per square foot to construct or expand the cleaning facilities.

#### l. Earnings Records

The proposed rule requires that employers generate a daily record of the site of the employee's work, or availability to work, whether it was on

<sup>38</sup> This cost per square foot estimate is based on the average cost to add a bathroom to a building from The Nest (Source: <http://budgeting.thenest.com/average-cost-per-square-foot-add-addition-house-23356.html>. Accessed Nov. 13, 2014).

the open range or on the ranch or farm. The proposed rule also requires that employers retain records of hours worked and duties performed when the worker is performing work on the ranch or farm. This provision is new and will allow the Department to monitor compliance with and enforce H-2A program obligations.

#### i. Costs

This change represents a possible minor cost to herding or open range livestock production employers who are not already retaining hours worked records. The Department estimates the cost by multiplying the time required to prepare and store timesheets by the average compensation of a human resources manager at an agricultural business. In the first year of the rule, the Department estimates that the average employer will spend approximately 6 minutes each week or approximately 5 hours a year (based on a 50 week average period of need) to prepare and store timesheets, which amounts to approximately \$379.50 (\$75.90 x 5) in labor costs per year.<sup>39</sup> The Department invites comments regarding the assumptions and data sources used to estimate the value of this cost.

#### m. Time To Read and Review the Rule

During the first year that this rule would be in effect, herding and open range livestock production employers would need to learn about the new requirements.

#### i. Costs

This requirement represents a cost to herding and open range livestock production employers in the first year of the rule. The Department estimates this cost by multiplying the time required to read and review the new rule, application, compliance processes, and outreach materials explaining the program (2 hours) by the average compensation of a human resources manager at an agricultural business (\$75.90).<sup>40</sup> This amounts to

<sup>39</sup> The Department estimates that herding and open range livestock production employers will spend 6 minutes each week to record and store worker time sheets. The average period of need for an H-2A worker is 50 weeks a year. The median hourly wage for a human resources manager is \$53.45 (as published by the Department's OES survey, O\*Net Online), which we multiply by 1.42 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). This calculation yields an hourly labor cost of \$75.90.

<sup>40</sup> The median hourly wage for a human resources manager is \$53.45 (as published by the Department's OES survey, O\*Net Online), which we multiply by 1.42 to account for private-sector employee benefits (source: Bureau of Labor Statistics). This calculation yields an hourly labor cost of \$75.90.

approximately \$151.80 in labor costs in the first year and an average annual cost of \$15.18 over the 10-year analysis period. The Department invites comments regarding the assumptions and data sources used to estimate the value of this cost.

5. Summary of Impacts

Costs and Transfers

Exhibit 20 presents a summary of first-year, the sixth-year, and average annual costs and transfers by affected entity. The Department estimates the total first-year costs and transfers of the proposed rule to be \$7.45 million and \$17.43 million, respectively. The transfer from all herding and open range livestock production employers to workers due to the revised wage determination methodology based on the forecasted AEWR phased in over five years amounts to \$17.43 million. The largest first-year cost is the cost to expand cooking/cleaning facilities at \$3.02 million, followed by the cost of providing water to workers, the cost of providing food to workers, and the time required to read and review the NPRM. These costs and transfers are incurred by all herding and open range livestock production employers with the

exception of the cost of providing food to workers, which is incurred only by open range livestock production employers. Open range livestock production employers experience a cost reduction of approximately \$0.09 million in the first year of the rule due to the proposed elimination of the newspaper advertising requirement.

The Department included the total costs and transfers of the proposed rule in the sixth year of the analysis. These are the costs and transfers that would prevail once the 5-year phase-in is complete. The Department estimates the total sixth-year costs and transfers of the proposed rule to be \$4.81 million and \$54.03 million, respectively. The transfer from all herding and open range livestock production employers to workers due to the revised wage determination methodology based on the forecasted AEWR phased in over five years amounts to \$54.03 million. The largest sixth-year cost is the cost to provide water to workers at \$2.99 million, followed by the cost of providing food to workers, and the cost to expand cooking/cleaning facilities. Open range livestock production employers experience a cost reduction of approximately \$0.10 million in the

first year of the rule due to the proposed elimination of the newspaper advertising requirement.

In general, average annual costs and transfers are larger than those in the first year because of the phase-in of the wage increases and because the Department estimates the H-2A participant population to increase over the 10-year analysis period. The exceptions to this are the impacts that include fixed costs in the first year of the rule (*i.e.*, Expanded Cooking/Cleaning Facilities, Time to Read and Review NPRM). The average annual transfer from employers to employees due to the revised wage determination methodology amounts to \$45.08 million per year. The largest cost is providing water to workers at \$2.97 million per year, followed by the cost of providing meals to workers at \$1.74 million per year, the cost of expanding cooking/cleaning facilities at \$0.36 million per year, and the time required to read and review the NPRM at \$0.01 million per year. The Department estimates the average annual cost of the proposed rule to be \$5.08 million. Open range livestock production employers experience an average annual cost reduction of approximately \$0.10 million.

EXHIBIT 20—SUMMARY OF COSTS AND TRANSFERS

Required action	Entity affected	Monetized year 1 costs/transfers (\$millions)	Monetized year 6 costs/transfers (\$millions)	Average annual costs/transfers (\$millions)
<b>Costs</b>				
1 Proportion/type of work permitted at the ranch.	All Employers .....	Not Monetized .....	Not monetized .....	Not Monetized.
2 Filing requirements .....	Open Range Employers ...	Not Monetized .....	Not Monetized .....	Not Monetized.
3 Job order submissions	Open Range Employers ...	Not Monetized .....	Not Monetized .....	Not Monetized.
4 Job order duration .....	Herding Employers .....	Not Monetized .....	Not Monetized .....	Not Monetized.
5 Newspaper advertisements.	Open Range Employers ...	(\$0.09) .....	(\$0.10) .....	(\$0.10).
6 Placement of workers on master applications.	All Employers .....	Not Monetized .....	Not Monetized .....	Not Monetized.
7 Employer-provided items.	All Employers .....	Not Monetized .....	Not Monetized .....	Not Monetized.
8 Meals .....	Open Range Employers ...	\$1.59 .....	\$1.76 .....	\$1.74.
9 Water .....	All Employers .....	2.76 .....	2.99 .....	2.97.
10 Expanded cooking/cleaning facilities.	All Employers .....	3.02 .....	0.07 .....	0.36.
11 Earnings records .....	All Employers .....	Not Monetized .....	Not Monetized .....	Not Monetized.
12 Time required to read and review the NPRM.	All Employers .....	0.08 .....	0.00 .....	0.01.
Total Costs .....	.....	7.36 .....	4.71 .....	4.98.
<b>Transfers</b>				
1 New wage determination methodology based on the phased-in AEWR.	All Employers .....	17.43 .....	54.03 .....	45.08.
Total Transfers .....	.....	17.43 .....	54.03 .....	45.08.

**Note:** Totals may not sum due to rounding.

Exhibit 21 presents a summary of the economic impact analysis of the proposed rule. The monetized net costs and transfers displayed are the yearly summations of the calculations described above. In some cases, the totals for one year are less than the totals of the annual averages described above. The total (undiscounted) costs and transfers of the rule sum to \$49.82

million and \$450.84 million over the 10-year analysis period, respectively. This amounts to an average annual cost and transfer of \$4.98 million and \$45.08 million per year, respectively. In total, the 10-year discounted costs of the proposed rule range from \$35.35 million to \$42.67 million (with 7 and 3 percent discounting, respectively). In total, the 10-year discounted transfers of the

proposed rule range from \$298.33 million to \$374.97 million (with 7 and 3 percent discounting, respectively).

Because the Department was not able to quantify any benefits of the proposed rule, the costs and transfers exceed the benefits at both 7 percent and 3 percent discounting.

EXHIBIT 21—SUMMARY OF MONETIZED COSTS/TRANSFERS

Year	Net costs (\$millions/year)	Transfers (\$millions/year)
1 2016 .....	7.36	17.43
2 2017 .....	4.35	26.59
3 2018 .....	4.44	31.05
4 2019 .....	4.53	41.59
5 2020 .....	4.62	52.97
6 2021 .....	4.71	54.03
7 2022 .....	4.81	55.11
8 2023 .....	4.90	56.22
9 2024 .....	5.00	57.34
10 2025 .....	5.10	58.49
Undiscounted total .....	49.82	450.84
Average annual impact .....	4.98	45.08
Total with 7% discounting .....	35.35	298.33
Total with 3% discounting .....	42.67	374.97

Note: Totals may not sum due to rounding.

Benefits

The Department was able to identify cost reductions of the proposed rule due to the elimination of the newspaper advertising requirement, which range from \$0.09 million to \$0.11 million per year over the 10-year analysis period. The Department also expects there to be cost reductions due to the revised job order submission requirements and the revised master application filing requirements. However, the Department was not able to quantify those cost reductions resulting from the proposed rule.

Due to data limitations, the Department also did not quantify several of the important benefits to society provided by the proposed policies. Through this rulemaking the Department is establishing a new methodology for determining a monthly AEW and clarifying employer obligations for these unique occupations with the aim of protecting the wages and working conditions of U.S. workers and better assessing their availability for these jobs based on appropriate terms and conditions of employment. The higher wages for workers will result in an improved ability on the part of workers and their families to meet their costs of living and spend money in their local communities. Higher wages may also decrease turnover among U.S. workers and thereby decrease the costs

of recruitment and retention to employers. Reduced worker turnover is associated with lower costs to employers arising from recruiting and training replacement workers. Because seeking and training new workers is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005).<sup>41</sup>

This potential retention of U.S. workers may reduce the need to import temporary foreign workers to fill these jobs. Furthermore, higher wages may have positive impacts on productivity. Higher wages can boost employee morale, thereby leading to increased effort and greater productivity. For example, Holzer (1990)<sup>42</sup> finds that high-wage firms can sometimes offset more than half of their higher wage

costs through improved productivity and lower hiring and turnover costs.

In addition, proposed clarifications for such requirements as providing sufficient housing; supplying all tools, supplies, and equipment required, free of charge; establishing effective means of communication in case of emergencies; and providing meals and potable water will better foster the safety and health of both U.S. and H-2A workers as they perform these jobs. Due to data limitations, the Department was not able to quantify or monetize the impact of these protective measures. The Department invites comments regarding possible data sources or calculation methodologies for the estimation of this protective benefit. In addition, the Department invites comments regarding other benefits that may arise from the rule and how these benefits may be estimated.

6. Alternatives

The Department conducted economic analyses of the alternatives discussed above to better understand their costs relative to the baseline. For each of the analyses, the baseline is the 2010 Final Rule, TEGL 32-10, and TEGL 15-06, Change 1.

<sup>41</sup> Reich, Michael, Peter Hall, and Ken Jacobs, "Living Wages and Economic Performance: The San Francisco Airport Model," Institute of Industrial Relations, University of California, Berkeley, March 2003. Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses," LAANE, 2005.

<sup>42</sup> Holzer, Harry, "Wages, Employer Costs, and Employee Performance in the Firm," *Industrial and Labor Relations Review*, Vol. 43, No. 3, pp 147-164, 1990.

a. Policy Changes in the NPRM Using the AEWV Values by USDA Region, Which Are Incrementally Phased In Over Five Years

The first alternative—this NPRM—retains the most effective features of the 2010 Final Rule, TEGL 32–10, TEGL 15–06, Change 1, and proposes provisions to best achieve the Department’s policy objectives. The analysis presented above lays out the calculations of the costs and benefits of the proposed regulation. The proposed regulation increases the responsibilities of the employers in herding and open range production occupations by establishing required wage rates using the AEWV values by USDA region, which are incrementally phased in over five years and by codifying special procedures in the H–2A program. As calculated above, the 10-year monetized costs of this alternative range from \$35.35 million to \$42.67 million (with 7 and 3 percent discounting, respectively). The 10-year monetized transfers of this alternative range from \$298.33 million to \$374.97 million (with 7 and 3 percent discounting, respectively).

b. Policy Changes in the NPRM Using the AEWV Values by USDA Region, Which Are Incrementally Phased In Over Three Years

The second alternative retains the same features of the 2010 Final Rule, TEGL 32–10, TEGL 15–06, Change 1, and proposes the same provisions as the first alternative; the only difference is that the AEWV-based wage determination is incrementally phased in over three years. As calculated above, the 10-year monetized costs of this alternative range from \$35.35 million to \$42.67 million (with 7 and 3 percent discounting, respectively). The 10-year monetized transfers of this alternative range from \$320.03 million to \$399.48 million (with 7 and 3 percent discounting, respectively).

c. Policy Changes in the NPRM Using the AEWV Values by USDA Region With no Phase-in Period

The third alternative retains the same features of the 2010 Final Rule, TEGL 32–10, TEGL 15–06, Change 1, and proposes the same provisions as the first alternative; the only difference is that the AEWV-based wage determination does not utilize a phase-in schedule. As calculated above, the 10-year monetized costs of this alternative range from \$35.35 million to \$42.67 million (with 7 and 3 percent discounting, respectively). The 10-year monetized transfers of this alternative range from \$356.38 million to \$437.79 million

(with 7 and 3 percent discounting, respectively).

B. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.” Pub. L. 96–354, Sec. 2(b). To achieve that objective, the Act requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis, and to develop alternatives whenever possible, when drafting regulations that will have a significant economic impact on a substantial number of small entities. The Act requires the consideration of the impact of a proposed regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department believes that this proposed rule will have a significant economic impact on a substantial number of small entities and is therefore publishing this initial regulatory flexibility analysis as required, and to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the following estimates, including the number of small entities affected by the proposed rule, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of the proposed rule.

1. Why the Department Is Considering Action

As explained earlier in this preamble, the Department has concluded that developments in the H–2A program, including the APA violation found by the Court of Appeals in *Mendoza* and the continuing difficulty the Department experiences in determining an appropriate AEWV using the current wage setting methodology, require additional notice and comment rulemaking on proper regulatory standards and minimum wage setting methodology for these occupations in the H–2A program. The Department continues to evaluate its policy choices in light of additional public input and program experience. As a result, the Department publishes this NPRM on the proper standards and wage methodology for open range herding and livestock production occupations in the H–2A program, and we seek public input on all aspects of the proposals presented here.

2. Objectives of and Legal Basis for Rule

The Department is proposing to establish the standards that employers seeking H–2A workers to perform open range herding and livestock production work must meet to comply with H–2A program obligations, including wage rates determined under a new wage setting methodology that allows the Department to fulfill its statutory obligations. Sections 214(c)(1) and 218 of the INA, 8 U.S.C. 1184(c)(1) and 1188, require an H–2A employer to petition DHS for classification of a prospective temporary worker as an H–2A nonimmigrant. The INA authorizes the DHS to admit foreign workers to the United States under the H–2A visa classification if the Secretary of Labor certifies both that there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and that the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). Accordingly, DHS regulations require employers to obtain certification from DOL that these conditions are met before submitting a petition to DHS. 8 CFR 214.2(h)(5)(i).

The Secretary of Labor has delegated the responsibility for making the factual determinations necessary to issue certifications, through the Assistant Secretary, ETA, to ETA’s OFLC. Sec. Order 06–2010, 75 FR 66268 (Oct. 27,



2010). The Department's regulations governing H-2A certifications authorize the OFLC Administrator to establish, continue, revise, or revoke special procedures for processing certain H-2A applications, including H-2A applications for open range herders and livestock production occupations. 20 CFR 655.102.

### 3. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

The Department has estimated the incremental costs for small businesses from the baseline (*i.e.*, the 2010 Final Rule, TEGL 32-10, and TEGL 15-06, Change 1) to this proposed rule. We have estimated the costs of (a) the new methodology for determining the monthly Adverse Effect Wage Rate (AEWR) of workers engaged in the herding or production of livestock on the open range; (b) elimination of requirements to advertise in a newspaper of general circulation in the area of intended employment (cost reduction); (c) provision of meals; (d) provision of additional water for laundry and cleaning, and the provision of potable water for drinking and cooking; (e) provision of cooking/cleaning facilities at the ranch; and (f) time to read and review the rule. This analysis includes the incremental cost of this proposed rule as it adds to the requirements in the 2010 Final Rule, TEGL 32-10, and TEGL 15-6, Change 1. The cost estimates included in this analysis for the provisions of the proposed rule are consistent with those presented in the EO 12866 section.

The Department identified the following provisions of the proposed rule to have an impact on industry but was not able to quantify the impacts due to data limitations: Proportion/type of work permitted at the ranch (*i.e.*, not on the open range); filing requirements; job order submissions; job order duration; placement of workers on master applications; employer-provided items; and retaining earnings records.

#### a. New Methodology for Estimating the Wages of Workers

Through this rulemaking, the Department is proposing to change the methodology for determining the monthly AEWR for workers engaged in the herding or production of livestock on the open range by using the FLS conducted by the USDA NASS. Specifically, the Department proposes to create a single monthly minimum AEWR for all occupations subject to this part by converting the hourly AEWRs into monthly rates by using 44 hours per week and 4.333 weeks per month to

arrive at the monthly AEWR for each State.

#### b. Newspaper Advertisements

The Department is proposing to continue for sheep and goat herding occupations and expand to production of livestock occupations on the open range the TEGL practice of granting a waiver of the regulatory requirement to place two advertisements in a newspaper of general circulation serving the area of intended employment. Because both herding and production of livestock on the open range cover multiple areas of intended employment within one or more States, this regulatory requirement is impractical and ineffective for recruiting domestic workers for these types of job opportunities.

#### c. Meals

All H-2A employers must provide either three meals a day or free and convenient kitchen facilities. Currently, as required under the sheep and goat herding TEGL and practice in the industry for herding or production of livestock on the open range, employers provide, at no cost to the worker, provisions (food), utensils, and other kitchen facilities for workers to use in preparing their own meals. During certain seasons of the year, the employer may provide workers with prepared meals, at no cost to the worker. The proposed rule codifies this common practice as a requirement for both employers engaged in herding and those engaged in the production of livestock on the open range that must be disclosed in the job offer, and employers must provide H-2A workers and workers in corresponding employment either three sufficient meals a day, free of charge, or free food provisions and free and convenient cooking and kitchen facilities.

#### d. Water

In addition to providing three sufficient meals per day or furnishing free food and convenient cooking and kitchen facilities, the proposed rule also requires that employers provide to workers a supply of water sufficient to meet the needs of the worker(s), including not only cooking, consumption, and bathing, but also for cleaning and laundry requirements. The water for drinking and cooking must be potable or easily rendered potable, and the employer must provide the means necessary to render adequate quantities of water potable.

#### e. Provision of Cooking/Cleaning Facilities at the Ranch

The Department recognizes that there are times when the mobile housing is located at or near the ranch or a central location that has fixed housing for workers for certain operations that are a normal part of the herding cycle, such as birthing (in some cases), shearing, or branding. We acknowledge that the mobile housing may in such instances continue to be used, even preferred, by workers, even where access to fixed housing exists.

Where a worker continues to use the mobile housing provided for open range work while temporarily stationed at the ranch, the proposed rule obligates the herding or open range livestock production employer to provide the workers with access to facilities such as toilets and showers with hot and cold water under pressure.

In situations in which the workers are near the ranch (reasonably able to return to it each night) but choose not to do so, they must still be provided access to cooking and cleaning facilities. Herding and open range livestock production employers do not need to maintain full housing in such cases, but must provide access to toilets, kitchens, and cleaning facilities for both person and clothing.

#### f. Time To Read and Review the Rule

During the first year that this rule would be in effect, herding and open range livestock production employers would need to learn about the new requirements.

### 4. Calculating the Impact of the Proposed Rule on Small Business Firms

The Department has estimated the incremental costs for small businesses from the baseline (*i.e.*, the 2010 Final Rule, TEGL 32-10, and TEGL 15-06, Change 1) to this proposed rule. We have estimated the costs of (a) the new methodology for determining the monthly AEWR of workers engaged in the herding or production of livestock on the open range; (b) elimination of requirements to advertise in a newspaper of general circulation in the area of intended employment (cost reduction); (c) provision of meals; (d) provision of potable water; (e) provision of cooking/cleaning facilities at the ranch; and (f) time to read and review the rule. This analysis includes the incremental cost of this proposed rule as it adds to the requirements in the 2010 Final Rule, TEGL 32-10, and TEGL 15-6, Change 1. The Department was not able to quantify the impacts of the following provisions of the proposed rule: Proportion/type of work permitted

at the ranch; filing requirements; job order submissions; job order duration; placement of workers on master applications; employer-provided items; and retaining earnings records. Thus, the total cost to small entities is likely higher than the total cost presented in this analysis, although the Department believes those additional costs are minor.

To examine the impact of this proposed rule on small entities, the Department evaluates the impact of the incremental costs on the average small entity in the relevant industries, which is assumed to apply for certification to employ 3 H-2A workers. The Department estimates this value based on the number of H-2A workers requested by employers in these industries using data from the FY 2012 H-2A certification dataset. In FY 2012, there were 2,706 H-2A workers certified on 1,013 applications. Not all of these 2,706 certified workers entered the U.S. to work for the 517 estimated unique employers, and some of the employers had multiple applications that were fully certified, resulting in the double counting of workers in some cases. Therefore, the Department approximated the average number of H-2A workers per small entity by dividing the total number of certified H-2A workers in FY 2012 (2,706) by the total number of certified applications (1,013) to derive the estimate of approximately 3 H-2A workers per small entity (2,706/1,013). The Department invites comments from the public on its calculation of the average number of H-2A workers per small entity. Additionally, the Department estimates that the farms in these industries have average annual revenues of approximately \$252,050.<sup>43</sup>

#### a. New Methodology for Determining the Monthly AEW

As discussed above, under the proposed wage determination methodology, the use of the five year phased-in hourly AEW to determine an average hourly wage results in an increase of \$2.70 in hourly wages paid to H-2A workers in 2016. Please refer to

<sup>43</sup> According to the 2012 Census of Agriculture, the average revenue (i.e., the average market value of agricultural products sold and government payments) per farm in the relevant industries is \$248,411. Adjusting for inflation using the Consumer Price Index for All Urban Consumers (CPI-U), the average revenue per farm in the relevant industries is \$252,050 in 2013 dollars. Thus, the Department estimates that a small farm in the relevant industries will have average annual revenues of approximately \$252,050. As discussed in section 5, the SBA defines a small entity in these industries as an establishment with annual revenues of less than \$0.75 million.

Section A(4)(b) above (New Methodology for Determining Wages of Workers) for a discussion of the baseline and new wage determination methodology. The Department multiplies this average hourly wage increase by 44 hours per week to obtain a weekly cost per worker of \$118.80 ( $\$2.70 \times 44$ ) in 2016. The Department then multiplies this weekly cost by 50, which is the average period of need for workers in these industries. This results in a total cost of \$5,940.00 ( $\$118.80 \times 50$ ) per H-2A worker in 2016. For employers hiring the average number of H-2A workers (3), this results in a total cost of \$17,820.00 ( $\$5,940.00 \times 3$ ) due to the increase in wages in 2016.

To estimate the average annual cost of increased wages paid to H-2A workers under the first wage determination methodology alternative, the Department calculates the average annual hourly wage increase over the period of analysis using the following average hourly wage increases relative to the appropriate 2014 monthly AEW decomposed into hourly wage rates \$2.70 for 2016, \$4.05 for 2017, \$4.63 for 2018, \$6.08 for 2019, and \$7.59 for 2020 to 2025. Given the average annual hourly wage increase (\$6.30), a 44-hour workweek, and an average period of need for workers of 50 weeks, the Department estimates an average annual cost of \$13,860.00 ( $\$6.30 \times 44 \times 50$ ) per H-2A worker. For employers hiring the average number of H-2A workers (3), this results in an average annual cost of \$41,580.00 ( $\$13,860.00 \times 3$ ) per small entity due to the increase in wages.

Under the wage determination methodology alternative applying the forecasted AEW phased in over three years, the use of the phased-in hourly AEW to estimate an average hourly wage results in an increase of \$2.70 in hourly wages paid to H-2A workers in 2016. The Department multiplies this average hourly wage increase by 44 hours per week to obtain a weekly cost per worker of \$118.80 ( $\$2.70 \times 44$ ) in 2016. The Department then multiplies this weekly cost by 50, which is the average period of need for workers in these industries. This results in a total cost of \$5,940.00 ( $\$118.80 \times 50$ ) per H-2A worker in 2016. For employers hiring the average number of H-2A workers (3), this results in a total cost of \$17,820.00 ( $\$5,940.00 \times 3$ ) per small entity due to the increase in wages in 2016.

To estimate the average annual cost of increased wages paid to H-2A workers under the 3-year alternative, the Department calculates the average annual hourly wage increase over the period of analysis using the following

average hourly wage increases relative to the appropriate 2014 monthly AEW decomposed into hourly wage rates: \$2.70 for 2016, \$4.42 for 2017, \$7.04 for 2018, \$7.31 for 2019, and \$7.59 for 2020 to 2025. Given the average annual hourly wage increase (\$6.70), a 44-hour workweek, and an average period of need for workers of 50 weeks, the Department estimates an average annual cost of \$14,742.20 ( $\$6.70 \times 44 \times 50$ ) per H-2A worker. For employers hiring the average number of H-2A workers (3), this results in an average annual cost of \$44,226.60 ( $\$14,742.20 \times 3$ ) per small entity due to the increase in wages.

Under the wage determination methodology alternative applying the forecasted AEW with no phase-in, the use of the hourly AEW to estimate an average hourly wage results in an increase of \$6.50 in hourly wages paid to H-2A workers in 2016. The Department multiplies this average hourly wage increase by 44 hours per week to obtain a weekly cost per worker of \$286.00 ( $\$6.50 \times 44$ ) in 2016. The Department then multiplies this weekly cost by 50, which is the average period of need for workers in these industries. This results in a total cost of \$14,300.00 ( $\$286.00 \times 50$ ) per H-2A worker in 2016. For employers hiring the average number of H-2A workers (3), this results in a total cost of \$42,900.00 ( $\$14,300.00 \times 3$ ) per small entity due to the increase in wages in 2016.

To estimate the average annual cost of increased wages paid to H-2A workers under the alternative using no phase-in, the Department calculates the average annual hourly wage increase over the period of analysis using the following average hourly wage increases relative to the appropriate 2014 monthly AEW decomposed into hourly wage rates: \$6.50 for 2016, \$6.77 for 2017, \$7.04 for 2018, \$7.31 for 2019, and \$7.59 for 2020 to 2025. Given the average annual hourly wage increase (\$7.32), a 44-hour workweek, and an average period of need for workers of 50 weeks, the Department estimates an average annual cost of \$16,095.20 ( $\$7.316 \times 44 \times 50$ ) per H-2A worker. For employers hiring the average number of H-2A workers (3), this results in an average annual cost of \$48,285.60 ( $\$16,095.20 \times 3$ ) per small entity due to the increase in wages.

#### b. Newspaper Advertisements

Through this proposed rule, the Department is proposing to expand to production of livestock occupations on the open range the TEGL practice for sheep and goat herding occupations of granting a waiver of the requirement to place two advertisements in a newspaper serving the area of intended

employment. This would result in a minor cost reduction. To estimate this cost reduction, the Department multiplies the number of newspaper advertisements required per open range livestock production employer (2) by the average cost of placing a newspaper advertisement (\$258.64) to obtain an avoided cost of purchasing advertising space equal to \$517.28 ( $2 \times \$258.64$ ) per open range livestock production employer per year.<sup>44</sup> The Department also estimates the labor cost required to prepare the advertisements by multiplying the number of newspaper advertisements required per open range livestock production employer (2) by the assumed time required to prepare a newspaper advertisement (0.5 hours) and the hourly compensation of a human resources manager (\$75.90), which amounts to \$75.90 ( $2 \times 0.5 \times \$75.90$ ) in avoided labor costs per open range livestock production employer per year.<sup>45</sup> In total, this requirement would result in a cost reduction of \$593.18 ( $\$517.28 + \$75.90$ ) per year for employers of open range livestock production occupations.

#### c. Meals

Under the proposed rule, the Department is proposing to require H-2A employers to provide either three sufficient meals per day or free and convenient kitchen facilities and food provisions to workers. This change represents a cost to open range livestock production employers but not to sheep or goat herding employers because this is already a requirement under TEGL 32-10. To estimate this cost, the Department multiplies the number of meals required per open range livestock production worker per week (21) by the average cost of a meal (\$3.86) and the average duration of need in weeks (50) to obtain a cost of \$4,053.00 ( $21 \times \$3.86 \times 50$ ) per open range livestock production worker per year.<sup>46</sup>

In addition to the cost to purchase food, open range livestock production

employers would also incur costs to transport the food to the workers. The Department assumes that food would be transported to the workers on a weekly basis along with the potable water. The costs related to transporting food and potable water are accounted for below in the section on costs related to potable water.

#### d. Water

The proposed rule requires that the herding or open range livestock production employer continue to provide to the workers adequate provision of water for drinking, cooking and bathing; the proposed rule adds requirements for sufficient water for laundry and cleaning. In addition, the rule proposes to require that drinking and cooking water be potable or easily rendered potable. The Department estimates this cost by summing the cost of purchasing the water, the cost of purchasing a trailer to transport the water and meals, the cost of vehicle mileage, and the labor cost of the time required to transport the water and meals to the workers.

The Department estimates the cost of purchasing the water by multiplying the cost per gallon of potable water (\$0.005) by the number of gallons of water per worker per week (28) and the average duration of need in weeks (50). This calculation yields a cost of providing potable water equal to \$7.00 ( $\$0.005 \times 28 \times 50$ ) per worker per year.<sup>47</sup>

The Department estimates the cost of purchasing a utility trailer to be \$839.34.<sup>48</sup> This results in a one-time cost of \$839.34 for the average employer in the first year of the rule. This value yields an average annual cost of \$83.93 over the 10-year analysis period.

The Department estimates the cost of vehicle mileage per employer by multiplying the average vehicle mileage cost (\$0.59) by the number of miles driven to transport the potable water and meals roundtrip (100) and the average number of roundtrips per year (50).<sup>49</sup> This calculation yields a mileage

cost equal to \$2,960.00 ( $\$0.592 \times 100 \times 50$ ) per employer per year.

The Department estimates the labor cost of time to transport the water and meals to workers by multiplying the average number of roundtrips required per employer (50) by the assumed time required to transport the water (2.86 hours) and the hourly compensation of an agricultural worker (\$13.01), which amounts to \$1,860.03 ( $50 \times 2.86 \times \$13.01$ ) in labor costs per employer per year.<sup>50</sup>

Finally, the Department sums the cost of purchasing water, the cost of purchasing a trailer to transport the water and meals, the cost of vehicle mileage, and the labor cost of the time required to transport the water and meals to the workers. This requirement would result in a cost of \$5,666.37 ( $\$7.00 + \$839.34 + \$2,960.00 + \$1,860.03$ ) per employer hiring only one H-2A worker during the first year of the rule. The average annual cost of this provision for employers hiring only one H-2A worker is \$4,910.96 ( $\$7.00 + \$83.93 + \$2,960.00 + \$1,860.03$ ) over the 10-year analysis period. For employers hiring the average number of H-2A workers (3), the first-year cost increases to \$5,680.37 ( $\$7.00 \times 3 + \$839.34 + \$2,960.00 + \$1,860.03$ ), and the average annual cost increases to \$4,924.96 ( $\$7.00 \times 3 + \$83.93 + \$2,960.00 + \$1,860.06$ ). This is an upper-bound estimate because employers currently are required to provide water that meets State health requirements that is sufficient to meet the employees' needs for drinking, cooking, and bathing. Therefore, employers likely already have trailers and are making trips to deliver the water.

#### e. Expanded Cooking/Cleaning Facilities

Where a worker continues to use the mobile housing provided for open range work while temporarily stationed at the ranch, the proposed rule obligates the herding or open range livestock production employer to provide the worker with access to facilities such as toilets and showers with hot and cold water with pressure. To estimate this

<sup>44</sup> The newspaper advertisement cost estimate is based on an advertisement of 158 words placed in *The Salt Lake Tribune* for one day; it is available at <http://placed.yourutahclassifieds.com/webbase/en/std/jsp/WebBaseMain.do>. (accessed on November 13, 2014).

<sup>45</sup> The Department estimates that the median hourly wage for a human resources manager is \$53.45 (as published by the Department's OES survey, O\*Net Online), which we increased by 1.42 to account for private-sector employee benefits (source: Bureau of Labor Statistics) for an hourly compensation rate of \$75.90.

<sup>46</sup> The meal cost estimate of \$3.86 is from *Allowable Meal Charges and Reimbursements for Daily Subsistence* published by the U.S. Department of Labor, Employment and Training Administration (source: [http://www.foreignlaborcert.doleta.gov/meal\\_travel\\_subsistence.cfm](http://www.foreignlaborcert.doleta.gov/meal_travel_subsistence.cfm); accessed on December 8, 2014).

<sup>47</sup> The Department estimated the potable water cost using data published in the *2014 Water and Wastewater Survey* by the Texas Municipal League. (Source: <http://www.tml.org/surveys>; accessed on November 13, 2014). The estimate is based on the average cost of potable water for commercial entities in all Texas cities with a population below 2,000 using the fee for 50,000 gallons.

<sup>48</sup> The trailer cost estimate is based on the average cost for a 5 x 8 ft. utility trailer from Tractor Supply Company, Lowes, and Home Depot.

<sup>49</sup> The cost per mile of owning and operating an automobile is based on the average costs in the U.S. Department of Transportation, Bureau of Transportation Statistics. (source: [http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/national\\_transportation\\_statistics/html/table\\_03\\_17.html](http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/national_transportation_statistics/html/table_03_17.html); accessed on November 13, 2014).

<sup>50</sup> The Department assumes that a roundtrip would be 100 miles and that an agricultural worker would drive at 35 mph. We divide the 100 miles by 35 mph to estimate that it would take an agricultural worker 2.86 hours to drive roundtrip (100/35). The Department assumes the workers are located within the 100-mile roundtrip distance so only one roundtrip per employer per week would be needed to transport water and meals to workers.

<sup>51</sup> The Department estimates that the median hourly wage for an agricultural worker is \$9.16 (as published by the Department's OES survey, O\*Net Online), which we increased by 1.42 to account for private-sector employee benefits (source: Bureau of Labor Statistics) for an hourly compensation rate of \$13.01.

cost, the Department multiplies the average cost per square foot to construct/expand cleaning facilities (\$270.00) by the assumed size of the facility that would be required to be constructed/expanded (100 square feet). This calculation results in a one-time cost of \$27,000.00 (\$270.00 × 100) for the average employer, which amounts to an average annual cost of \$2,700.00 over the 10-year analysis period.<sup>52</sup>

f. Time To Read and Review the Proposed Rule

During the first year that the proposed rule would be in effect, herding and open range livestock production employers would need to learn about the rule provisions and the activities necessary to remain compliant. In the first year of the rule, the Department estimates that the average small farm would spend approximately 2 hours of staff time to read and review the new rule, which amounts to approximately \$151.80 (\$75.90 × 2) in labor costs per

employer in the first year of the rule. This amounts to an average annual cost of \$15.18 (\$151.80/10) over the 10-year analysis period.<sup>53</sup>

g. Total Cost Burden for Small Entities

The Department’s calculations indicate that the total average annual cost of this proposed rule is \$49,220 (or 19.5 percent of annual revenues) for the average small entity employing three workers in sheep or goat herding occupations.<sup>54</sup> The total average annual cost of this proposed rule is \$60,786 (or 24.1 percent of annual revenues) for the average small entity employing workers in open range livestock production occupations.<sup>55</sup>

For small entities that apply for 1 worker instead of 3—representing the smallest of the small farms that hire workers—the Department estimates that the total average annual cost of the proposed rule is \$21,486 (or 8.5 percent of annual revenues) for entities employing a worker in a shepherding

or goat herding occupation.<sup>56</sup> The total average annual cost of the proposed rule is \$24,946 (or 9.9 percent of annual revenues) for small entities employing a worker in an open range livestock production occupation.<sup>57</sup>

Exhibit 22 presents a summary of the average annual cost per employer. The Department focuses on the average annual cost of the rule rather than costs in the first year because the phasing of the wage methodology increases the costs of compliance over the analysis time period. The total cost per employer varies depending on whether the employer is a shepherding/goat herding employer or an open range livestock production employer. The Department defines a “significant economic impact” as an impact that amounts to at least 3 percent of annual revenues. Due primarily to the increase in wages paid to H–2A workers, the proposed rule is expected to have a significant economic impact on affected small entities.

EXHIBIT 22—SUMMARY OF COSTS PER EMPLOYER

Provision	Entity affected	Average annual cost per employer	
		Hiring 1 worker	Hiring 3 workers
(a) New wage determination methodology based on the five-year phased-in AEWB.	All Employers .....	\$13,860.00	\$41,580.00
(b) Newspaper advertisements .....	Open Range Employers .....	(593.18)	(593.18)
(c) Meals .....	Open Range Employers .....	4,053.00	12,159.00
(d) Potable water .....	All Employers .....	4,910.96	4,924.96
(e) Expanded cooking/cleaning facilities .....	All Employers .....	2,700.00	2,700.00
(f) Time required to read and review the NPRM ...	All Employers .....	15.18	15.18
Average annual revenue		\$252,050	
Total Annual Cost Per Sheep/Goat herding Employer .....		\$21,486	49,220
Average Annual Cost as a Percentage of Revenue .....		8.5%	19.5%
Total Annual Cost Per Open Range Employer .....		\$24,946	\$60,786
Average Annual Cost as a Percentage of Revenue .....		9.9%	24.1%

The Department seeks feedback on the estimated total summary of compliance costs of this rule for small businesses, and the estimates for the individual requirements listed above. The Department seeks input on the data and assumptions that the agency utilized to make this calculation. In particular, the

Department seeks feedback on its estimates regarding the annual revenues for small entities, the baseline utilized for this analysis and the estimates of the numbers of H–2B workers and corresponding workers per employer. In addition, the Department seeks comments on whether there is a better

data source available to use for wage information, or alternatives to reduce the paperwork burden or other costs of the proposed rule.

<sup>52</sup>The Department assumes that the average employer will require a cleaning facility of approximately 100 square feet.

<sup>53</sup>The Department estimates that the median hourly wage for a human resources manager is \$53.45 (as published by the Department’s OES survey, O\*Net Online), which we increased by 1.42 to account for private-sector employee benefits (source: Bureau of Labor Statistics) for an hourly compensation rate of \$75.90.

<sup>54</sup>For illustration, the total average annual cost of \$49,220 for the average small entity applying for 3 workers in sheep or goat herding occupations results from summing the totals for the various rule

requirements described above as follows: \$49,220 = \$13,860.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>55</sup>For illustration, the total average annual cost of \$60,786 for the average small entity applying for 3 workers in open range livestock production occupations results from summing the totals for the various rule requirements described above as follows: \$60,786 = \$13,860.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 – \$593.18.

<sup>56</sup>For illustration, the total average annual cost of \$21,486 for the average small entity applying for 1 worker in a sheep or goat herding occupation

results from summing the totals for the various rule requirements described above as follows: \$21,486 = \$13,860.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>57</sup>For illustration, the total average annual cost of \$24,946 for the average small entity applying for 1 worker in an open range livestock production occupation results from summing the totals for the various rule requirements described above as follows: \$24,946 = \$13,860.00 + 4,053.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 – \$593.18.

### 5. Estimating the Number of Small Businesses Affected by the Rulemaking

A small entity is one that is “independently owned and operated and which is not dominant in its field of operation.” The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the relevant industries to which a rule applies, which in this case includes Beef Cattle Ranching and Farming (NAICS 112111), Dairy Cattle and Milk Production (NAICS 11212), Sheep and Goat Farming (NAICS 1124), and Other Animal Production (NAICS 1129).<sup>58</sup> The Department has adopted the SBA definition for these industries, which is an establishment with annual revenues of less than \$0.75 million.<sup>59</sup>

Approximately 99 percent of U.S. farms in the relevant industries have annual revenues of less than \$0.75 million and, therefore, fall within the SBA’s definition of a small entity.<sup>60</sup> The Department considers a rule to have an impact on a “substantial number of small entities” when the total number of small entities impacted by the rule is equal to or greater than 15 percent of the relevant universe of small entities affected in a given industry. Therefore, the Department concludes that the proposed rule will have a significant economic impact on a substantial number of small entities. In 2012, there were 517 employers participating in the H–2A program in the industries subject to the proposed rule. Using an annual growth rate of 2 percent, the Department estimates that there will be approximately 669 participants by 2025.

<sup>58</sup> Animal Aquaculture (NAICS 1125) is not considered a relevant industry for this proposed rulemaking. However, the IRFA analysis uses data from the 2012 Census of Agriculture, which does not distinguish between Animal Aquaculture (1125) and Other Animal Production (1129). Due to this data limitation, the Department includes Animal Aquaculture industry data in the calculations of this IRFA analysis. In addition, the Department excludes farms in the Cattle Feedlots (NAICS 112112) industry because cattle in feedlots do not graze on the open range; therefore, employers in the cattle feedlot industry would not be affected by the proposed rule.

<sup>59</sup> Source: U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (July 2014). Available at [http://www.sba.gov/sites/default/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf) (accessed on November 13, 2014).

<sup>60</sup> The relevant industries include the following: Beef Cattle Ranching and Farming (112111), Dairy Cattle and Milk Production (11212), Sheep and Goat Farming (1124), Animal Aquaculture (1125), and Other Animal Production (1129).

### 6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

### 7. Alternatives to the Proposed Rule

The Department has considered three alternatives: (1) To make the policy changes contained in the proposed rule in which the wage determination is based on forecasted AEW values by U.S. Department of Agriculture (USDA) region, which are incrementally phased in over five years; (2) to make the policy changes contained in the proposed rule in which the wage determination is based on forecasted AEW values by USDA region, which are incrementally phased in over three years; or (3) to make the policy changes contained in the proposed rule in which the wage determination is based on forecasted AEW values by USDA region, which do not utilize a phase-in schedule. The Department believes that the first alternative—to make the policy changes contained in the proposed rule using the wage based on forecasted AEW values by USDA region, which are incrementally phased in over five years—is the most consistent with its dual statutory mandate to ensure that there are not sufficient workers who are able, willing, qualified and available to perform the labor or services required, and that the employment of the foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed and appropriately accounts for labor market concerns. The Department does not consider the 3-year phase in and no phase in period alternatives appropriate because they do not appropriately account for the unique characteristics of these occupations that have historically resulted in a limited number of U.S. workers interested in performing the jobs and raise concerns about labor market disruption, such as loss of jobs and lack of labor when and where it is needed. The Department invites comments from the public on other possible alternatives to consider, including alternatives to the specific provisions contained in this NPRM.

The Department estimated the total cost burden on small entities for each of the alternatives as follows.

### Wage Methodology Calculation

#### a. Policy Changes in the NPRM Using the AEW Values by USDA Region, Which Are Incrementally Phased In Over Five Years

The first alternative—this NPRM—retains the most effective features of the 2010 Final Rule, TEGL 32–10, TEGL 15–06, Change 1 and proposes provisions to best achieve the Department’s policy objectives. The Department’s calculations indicate that the total average annual cost of this proposed rule is \$49,220 (or 19.5 percent of annual revenues) for the average small entity employing three workers in sheep or goat herding occupations.<sup>61</sup> The total average annual cost of this proposed rule is \$60,786 (or 24.1 percent of annual revenues) for the average small entity employing three workers in open range livestock production occupations.<sup>62</sup>

For small entities that apply for 1 worker instead of 3—representing the smallest of the small farms that hire workers—the Department estimates that the total average annual cost of the proposed rule is \$21,486 (or 8.5 percent of annual revenues) for entities employing a worker in a sheep or goat herding occupation.<sup>63</sup> The total average annual cost of the proposed rule is \$24,946 (or 9.9 percent of annual revenues) for small entities employing a worker in an open range livestock production occupation.<sup>64</sup>

<sup>61</sup> For illustration, the total average annual cost of \$49,220 for the average small entity applying for 3 workers in sheepherding or goat herding occupations results from summing the totals for the various rule requirements described above as follows: \$49,220 = \$13,860.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>62</sup> For illustration, the total average annual cost of \$60,786 for the average small entity applying for 3 workers in open range livestock production occupations results from summing the totals for the various rule requirements described above as follows: \$60,786 = \$13,860.00 × 3 + \$4,053.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

<sup>63</sup> For illustration, the total average annual cost of \$21,486 for the average small entity applying for 1 worker in a sheep or goat herding occupation results from summing the totals for the various rule requirements described above as follows: \$21,486 = \$13,860.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>64</sup> For illustration, the total average annual cost of \$24,946 for the average small entity applying for 1 worker in an open range livestock production occupation results from summing the totals for the various rule requirements described above as follows: \$24,946 = \$13,860.00 + 4,053.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

**b. Policy Changes in the NPRM Using the AEWV Values by USDA Region, Which Are Incrementally Phased In Over Three Years**

The second alternative retains the same features of the 2010 Final Rule, TEGL 32–10, TEGL 15–06, Change 1, and proposes the same provisions as the first alternative; the only difference is that the AEWV-based wage determination is incrementally phase in over three years. The Department's calculations indicate that the total average annual cost of this alternative would be \$51,867 (or 20.6 percent of annual revenues) for the average small entity employing sheep or goat herding occupations.<sup>65</sup> The total average annual cost of this alternative would be \$63,433 (or 25.2 percent of annual revenues) for the average small entity employing open range livestock production occupations.<sup>66</sup>

For small entities that apply for 1 worker instead of 3—representing the smallest of the small farms that hire workers—the Department estimates that the total average annual cost of this alternative would be \$22,368 (or 8.9 percent of annual revenues) for entities employing a worker in a sheep or goat herding occupation.<sup>67</sup> The total average annual cost of this alternative would be \$25,828 (or 10.2 percent of annual revenues) for small entities employing a worker in an open range livestock production occupation.<sup>68</sup>

**c. Policy Changes in the NPRM Using the AEWV Values by USDA Region With No Phase-In Period**

The third alternative retains the same features of the 2010 Final Rule, TEGL

32–10, TEGL 15–06, Change 1, and proposes the same provisions as the first alternative; the only difference is that the AEWV-based wage determination does not utilize a phase-in schedule. The Department's calculations indicate that the total average annual cost of this alternative would be \$55,926 (or 22.2 percent of annual revenues) for the average small entity employing sheep or goat herding occupations.<sup>69</sup> The total average annual cost of this alternative would be \$67,492 (or 26.8 percent of annual revenues) for the average small entity employing open range livestock production occupations.<sup>70</sup>

For small entities that apply for 1 worker instead of 3—representing the smallest of the small farms that hire workers—the Department estimates that the total average annual cost of this alternative would be \$23,721 (or 9.4 percent of annual revenues) for entities employing a worker in a sheep or goat herding occupation.<sup>71</sup> The total average annual cost of this alternative would be \$27,181 (or 10.8 percent of annual revenues) for small entities employing a worker in an open range livestock production occupation.<sup>72</sup>

The Department seeks feedback on its chosen method for the wage determination, and seeks input on other wage methodologies that would minimize the economic impact of this rule for small entities while protecting against adverse effect. For example, is there a better data source that should be utilized? Is the 5-year phase-in period appropriate?

**d. Differing Compliance and Reporting Requirements for Small Entities**

The NPRM provides for no differing compliance requirements and reporting requirements for small entities. As discussed above, approximately 99 percent of the U.S. firms in the relevant industries fall within the SBA's definition of a small entity.

However, DOL is interested in receiving feedback on alternatives to the proposed compliance and reporting requirements for all regulated entities that would minimize the costs of this rulemaking while still achieving the objectives of the rulemaking. For example, are there any significant alternatives for any of the following requirements: (a) Recording the type of work performed at the ranch (*i.e.*, not on the open range); (b) filing requirements; (c) job order submissions; (d) job order duration; (e) newspaper advertisements; (f) placement of workers on master applications; (g) employer-provided items; (h) meals; (i) potable water; (j) expanded cooking/cleaning facilities; (k) provision of communication access, (l) earnings records; and (m) time to read and review the rule?

**e. Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities**

This NPRM was drafted to clearly state the compliance requirements for all small entities subject to this proposed rule. The paperwork burden associated with the reporting burden related to the proposed recordkeeping requirements is addressed below in section N.

The Department seeks feedback on any ways it can clarify, consolidate or simplify the requirements in this regulation.

**f. Use of Performance Rather Than Design Standards**

The NPRM was written to provide clear guidelines to ensure compliance with the proposed rule's requirements. Under the proposed rule, small entities may achieve compliance through a variety of means. The Department makes available a variety of resources to small entities for understanding their obligations and achieving compliance.

**g. Exemption From Coverage of the Rule for Small Entities**

All small entities that avail themselves of the H–2A program and seek H–2A workers to perform open range herding and livestock production occupations must comply with the proposed procedures and standards, including wage rate determinations

<sup>65</sup> For illustration, the total average annual cost of \$51,867 for the average small entity applying for 3 workers in sheep or goat herding occupations results from summing the totals for the various rule requirements described above as follows: \$51,867 = \$14,742.20 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>66</sup> For illustration, the total average annual cost of \$63,433 for the average small entity applying for 3 workers in open range livestock production occupations results from summing the totals for the various rule requirements described above as follows: \$63,433 = \$14,742.20 × 3 + \$4,053.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

<sup>67</sup> For illustration, the total average annual cost of \$22,368 for the average small entity applying for 1 worker in a sheep or goat herding occupation results from summing the totals for the various rule requirements described above as follows: \$22,368 = \$14,742.20 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>68</sup> For illustration, the total average annual cost of \$25,828 for the average small entity applying for 1 worker in an open range livestock production occupation results from summing the totals for the various rule requirements described above as follows: \$25,828 = \$14,742.20 + 4,053.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

<sup>69</sup> For illustration, the total average annual cost of \$55,926 for the average small entity applying for 3 workers in sheep or goat herding occupations results from summing the totals for the various rule requirements described above as follows: \$55,926 = \$16,095.20 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>70</sup> For illustration, the total average annual cost of \$67,492 for the average small entity applying for 3 workers in open range livestock production occupations results from summing the totals for the various rule requirements described above as follows: \$67,492 = \$16,095.20 × 3 + \$4,053.00 × 3 + \$7.00 × 3 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

<sup>71</sup> For illustration, the total average annual cost of \$23,721 for the average small entity applying for 1 worker in a sheep or goat herding occupation results from summing the totals for the various rule requirements described above as follows: \$23,721 = \$16,095.20 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18.

<sup>72</sup> For illustration, the total average annual cost of \$27,181 for the average small entity applying for 1 worker in an open range livestock production occupation results from summing the totals for the various rule requirements described above as follows: \$27,181 = \$16,095.20 + 4,053.00 + \$7.00 + \$83.93 + \$2,960.00 + \$1,860.03 + \$2,700.00 + \$15.18 = \$593.18.

using the proposed wage methodology, if finalized. The Department has no authority to exempt small businesses from the proposed regulation. Furthermore, as noted above, approximately 99 percent of the U.S. firms in the relevant industries fall within the SBA's definition of a small entity.

### C. Unfunded Mandates Reform

Executive Order 12875—This rule will not create an unfunded Federal mandate upon any State, local or tribal government.

#### Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. This Proposed Rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2A worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs are mandated to perform certain activities for the Federal Government under this program, and are compensated for the resources used in performing these activities.

This NPRM includes no new mandates for the SWAs in the H-2A application process and does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more. It also does not result in increased expenditures by the private sector of \$100 million or more, because participation in the H-2A program is entirely voluntary. SWA activities under the H-2A program are currently funded by the Department through grants provided under the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

### D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this proposed rulemaking will impose a significant impact on a substantial number of small entities under the RFA; therefore, if the rule is finalized as proposed, the Department will be required to produce a Compliance Guide for Small Entities as mandated by the SBREFA. The Department has concluded that this Proposed Rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

### E. The Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. If implemented as proposed, we will submit to Congress and the Comptroller General of the United States a report regarding the issuance of the Final Rule prior to its effective date, as required by 5 U.S.C. 801(a)(1).

### F. Executive Order 13132—Federalism

The Department has reviewed this NPRM in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The NPRM does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, the Department has determined that this NPRM will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

### G. Executive Order 13175—Indian Tribal Governments

This NPRM was reviewed under the terms of E.O. 13175 and determined not to have Tribal implications. The NPRM does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. As a

result, no Tribal summary impact statement has been prepared.

### H. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires the Department to assess the impact of this NPRM on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this NPRM and determines that it will not have a negative effect on families.

### I. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

This NPRM is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

### J. Executive Order 12988—Civil Justice

This NPRM has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

### K. Plain Language

The Department drafted this NPRM in plain language.

### L. Executive Order 13211—Energy Supply

This NPRM is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

### M. Paperwork Reduction Act

This NPRM proposes a new information collection to the H-2A program and seeks approval from the Office of Management and Budget (OMB) under OMB Control Number 1205-NEW. The Department is not creating a specific form for this new collection requirement. Rather, the Department's proposal would require that employers keep and maintain records that reflect each day that the worker works, whether the work was performed on the open range or at the employer's ranch or farm. In addition,



for work that is conducted at the ranch or farm, the employer must keep records of the days worked and the nature of the work performed. Such records will enable the employer, and the Department, if necessary, to determine whether the worker performed work on the range at least 50 percent of the days during the contract period and that the work at the ranch that does not constitute the production of livestock was minor, sporadic, and incidental (*i.e.*, closely and directly related to herding and the production of livestock and occurred on no more than 20 percent of the workdays at the ranch).

This proposal constitutes a new information collection and creates an associated paperwork burden on the employers that must be assessed under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521. Based on the number of current applications for H–2A workers to perform herding work, the Department estimates that by 2016 the proposed information collection will affect 560 employers employing foreign sheepherders, goat herders, and other workers engaged in the open range production of livestock. The Department further estimates that it will take each employer, on average, 5 minutes each week to prepare timesheets for its employees, and 1 minute each week to store these timesheets. Thus, the reporting burden for 560 employers is 2,800 minutes (560 employers × 5 minutes) per week, or 47 hours per week. When annualized, the total reporting burden is 2,444 hours per year (47 hours per week × 52 weeks). The total record keeping burden for 560 employers is 560 minutes (560 employers × 1 minute) per week, or 9 hours per week. When annualized, the total recordkeeping burden is 468 hours per year (9 hours per week × 52 weeks). When these two sums are added together, the total employer reporting and recordkeeping burden is 2,912 hours per year.

When estimating the cost burden of paperwork requirements, the Department used the average salary of a Human Resources Manager based on the national cross-industry mean hourly wage rate for a Human Resources Manager (\$53.45), from the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,<sup>73</sup> and increased by a factor of 1.42 to account for employee benefits and other

compensation, for a total hourly cost of \$75.90. This number was multiplied by the total hourly annual burden created for this new requirement proposed by this NPRM, which, as noted above, is 2,912 hours per year. The total annual respondent hourly costs for this new burden placed on the employers in the sheepherding and open range production of livestock is estimated as follows:

Total Burden Cost of This Provision is 2,912 hours × \$75.90 = \$221,021 per year

As noted above, this collection of information is subject to the PRA. Accordingly, this information collection in this proposed rule has been submitted to OMB for review under 44 U.S.C. 3507(d) of the PRA. The PRA package for OMB Control Number 1205–NEW can be obtained by contacting the office listed below or in the **ADDRESSES** section of this Notice of Proposed Rulemaking or at the Web site: <http://www.reginfo.gov/public/dol/pramain>.

Written comments are encouraged and will be accepted until June 15, 2015.

When submitting comments on the new information collection, your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

#### Overview of Information Collection for the New Provision Proposed by This NPRM

*Type of Review:* New Collection.  
*Agency:* Employment and Training Administration.  
*Title:* H–2A Temporary Labor Certification Program.  
*OMB Number:* 1205–NEW.

*Affected Public:* Farm businesses.  
*Form(s):* None.  
*Total Annual Respondents:* 560.

*Annual Frequency:* Weekly.  
*Total Annual Responses:* 29,120.  
*Average Time per Response:* 6 minutes.

*Estimated Total Annual Burden Hours:* 2,912 hours per year.

*Total Annual Start-up/Capital/Maintenance Costs for Respondents:* \$0.

The Department invites comments on all aspects of the PRA analysis. Comments submitted in response to this request will be summarized and/or included in the request for OMB approval of the information collection. They will also be included on the administrative record of this rulemaking, and we will consider them in developing the final rule.

All comments and suggestions or question regarding additional information should be directed to the Federal e-Rulemaking Portal at: <http://www.regulations.gov> and a copy sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Employment and Training Administration, AND to Michel Smyth, Departmental Clearance Officer, Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210 or email: [Smyth.Michel@dol.gov](mailto:Smyth.Michel@dol.gov). The information collection aspects of the proposed rulemaking will not take effect until published in a final rule and approved by OMB. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(k)(1).

#### List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons discussed in the preamble, Department of Labor proposes to amend 20 CFR part 655 as follows:

#### PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read in part as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101 649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 733, 1748 (8 U.S.C. 1101 note);

<sup>73</sup> Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2013 National Occupational Employment and Wage Estimates; Management Occupations



sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

\* \* \* \* \*

■ 2. Subpart C is added to read as follows:

**Subpart C—Labor Certification Process for Temporary Agricultural Employment in Open Range Shepherding, Goat Herding, and Production of Livestock Occupations**

Sec.

- 655.200 Scope and purpose.
- 655.201 Definition of terms.
- 655.205 Job orders.
- 655.210 Contents of job orders.
- 655.211 Wage rate.
- 655.215 Procedures for filing applications for temporary employment certification.
- 655.220 Processing applications for temporary employment certification.
- 655.225 Post-acceptance requirements.
- 655.230 Mobile housing.
- 655.235 Standards for mobile housing.

**Subpart C—Labor Certification Process for Temporary Agricultural Employment in Open Range Shepherding, Goat Herding, and Production of Livestock Occupations**

**§ 655.200 Scope and purpose.**

(a) *Purpose.* The purpose of this subpart is to establish certain procedures for employers who apply to the Department of Labor to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the open range, as defined in this subpart. Unless otherwise specified in this subpart, employers whose job opportunities meet the qualifying criteria under this subpart must fully comply with all of the requirements of part 655, subpart B; part 653, subparts B and F; and part 654 of this chapter.

(b) *Jobs subject to this subpart.* These procedures apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock, as defined under § 655.201. Any additional job duties performed by the worker must be minor, sporadic, and incidental to the herding or production of livestock;

(2) The work is performed on the open range requiring the use of mobile housing, as defined under § 655.201, for at least 50 percent of the workdays in the work contract period because the worker is not reasonably able to return to his or her place of residence or to employer-provided fixed site housing within the same day. Any additional

work performed at a place other than the open range (e.g., an enclosed farm or ranch) that does not constitute the production of livestock must be minor, sporadic, and incidental to the herding or production of livestock; and

(3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

**§ 655.201 Definition of terms.**

The following are terms that are not defined in subpart B of this part and are specific to applications for labor certifications involving the herding or production of livestock on the open range.

*Herding.* Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the open range.

*Livestock.* An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of this subpart, livestock refers to those species raised on the open range.

*Minor, sporadic, and incidental work.* Work duties and activities that are closely and directly related to herding and the production of livestock and are performed on no more than 20 percent of the workdays spent at the ranch in a work contract period.

*Mobile housing.* Housing meeting the standards articulated under § 655.235 that can be moved from one area to another area on the open range.

*Open range.* Unenclosed public or private land outside of cities and towns in which sheep, cattle, goats, horses, or other domestic hooved animals, by ownership, custom, license, lease, or permit, are allowed to graze and roam. Animals are not meaningfully enclosed where there are no fences or other barriers protecting them from predators or restricting their freedom of movement; rather a worker must actively herd the animals and direct their movement. Open range may include intermittent fencing or barriers to prevent or discourage animals from entering a particularly dangerous area. These types of barriers prevent access to dangers rather than containing the animals, and therefore supplement rather than replace the worker's efforts.

*Production of livestock.* The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides

on the open range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock.

**§ 655.205 Job orders.**

The employer whose job opportunity has been determined to qualify for these procedures, whether individual, association, or H–2ALC, is not required to comply with the job order filing requirements in § 655.121(a) through (d). Rather, the employer must submit a job order, Form ETA 790, directly to the National Processing Center (NPC) designated by the Office of Foreign Labor Certification (OFLC Administrator) along with a completed *Application for Temporary Employment Certification*, Form ETA 9142, as required in § 655.130.

**§ 655.210 Contents of job orders.**

(a) *Content of job offers.* Unless otherwise specified in this subpart, the employer, whether individual, association, or H–2ALC, must satisfy the requirements for job orders established under § 655.121(e) and for the content of job offers established under part 653, subpart F of this chapter and § 655.122.

(b) *Job qualifications and requirements.* The job offer must include a statement that the workers are on call for up to 24 hours per day, 7 days per week and that the workers are primarily engaged (spend at least 50 percent of the workdays during the contract period) in the herding or production of livestock on the open range. Duties may include activities performed at the ranch or farm only if such duties constitute the production of livestock or are closely and directly related to herding and the production of livestock. Work that is closely and directly related to herding or the production of livestock must be performed on no more than 20 percent of the workdays spent at the ranch in a work contract period. All such duties must be specifically disclosed on the job order. The job offer may also specify that applicants possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the open range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers engaged in herding or the production of livestock on the open range. Any such requirements must be applied equally to both U.S. and foreign workers. Each job

qualification and requirement listed in the job offer must be bona fide, and the Certifying Officer (CO) may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) *Mobile range housing.* The employer must specify in the job order mobile housing will be provided. The housing must meet the requirements set forth in § 655.235.

(d) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker. Because of the unique nature of the herding or production of livestock on the open range, this equipment must include an effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. Although there may be periods of time when the workers are in locations where electronic communication devices may not operate effectively, the employer must arrange for workers to be located in geographic areas where electronic communication devices can operate effectively on a regular basis, unless the employer will make contact in-person with the worker regularly. The employer must specify in the job order that it will make contact with the worker in-person or using an electronic communication device regularly.

(e) *Meals.* The employer must specify in the job offer and provide to the worker, without charge or deposit charge, three sufficient meals a day, or furnish free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his own meals, and adequate potable water, or water that can be easily rendered potable and the means to do so.

(f) *Hours and earnings statements.* (1) The employer must keep accurate and adequate records with respect to the worker's earnings and furnish to the worker on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day as well as the time the worker begins and ends each workday when the worker is performing duties on the open range, but all other regulatory requirements in § 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating the site of the employee's work, whether it was on the open range or on the ranch or farm. The employer must also keep and maintain records of hours worked and duties performed over the course of the day when the worker is performing work on the ranch or farm. If the employer prorates a worker's monthly wage pursuant to paragraph (g)(2) of this section because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

(g) *Rates of pay.* The employer must pay the worker at least the monthly AEW, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage specific to the occupation(s) imposed by Federal or State law or judicial action, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, and must be paid to each worker free and clear without any unauthorized deductions no less than monthly.

(2) If the worker is paid by the month, the employer may prorate the monthly wage for the initial and final months of the job order period, if its pay period does not match the beginning or ending dates of the job order (such as if the employer pays on a calendar month basis and the job order starts or ends in the middle of the month). The employer also may prorate the monthly wage if an employee is voluntarily unavailable for work for personal reasons.

(h) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be no less frequently than monthly. Employers must pay wages when due.

#### **§ 655.211 Wage rate.**

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment and pay each worker employed under this subpart a wage that is the highest of the monthly AEWs established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage specific to the occupation(s) imposed by Federal or State law or judicial action.

(2) If the monthly AEW for a State established under this section is adjusted under the FLS during a work contract, and is higher than the highest of the monthly AEW, the agreed-upon collective bargaining wage, or the

applicable minimum wage specific to the occupation(s) imposed by Federal or State law or judicial action, in effect at the time the work is performed, the employer must pay that adjusted monthly AEW upon publication by the Department in the Federal Register.

(b) *Determining the monthly AEWs.* The monthly AEWs are calculated using the hourly AEWs, as defined under § 655.103(b), multiplied by 44 hours per week, and then multiplied by 4.333 weeks per month.

(c) *Publication of the monthly AEWs.* The OFLC Administrator will publish a notice in the **Federal Register**, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the monthly AEWs for each State.

(d) *Implementation Schedule for the monthly AEWs.* The monthly AEWs shall be determined using the method specified in paragraph (b) of this section and published in the **Federal Register**, as specified in paragraph (c) of this section, according to the following schedule:

(1) For calendar year 2016, the Department shall determine the monthly AEWs using 60 percent of the hourly AEWs established for each State based on wage surveys conducted for the preceding calendar year.

(2) For calendar year 2017, the Department shall determine the monthly AEWs using 70 percent of the hourly AEWs established for each State based on wage surveys conducted for the preceding calendar year.

(3) For calendar year 2018, the Department shall determine the monthly AEWs using 80 percent of the hourly AEWs established for each State based on wage surveys conducted for the preceding calendar year.

(4) For calendar year 2019, the Department shall determine the monthly AEWs using 90 percent of the hourly AEWs established for each State based on wage surveys conducted for the preceding calendar year.

(5) For calendar year 2020 and all subsequent calendar years, the Department shall determine the monthly AEWs using 100 percent of the hourly AEWs established for each State based on wage surveys conducted for the preceding calendar year.

#### **§ 655.215 Procedures for filing applications for temporary employment certification.**

(a) *Compliance with subpart B of this part.* Unless otherwise specified in this subpart, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated

by the OFLC Administrator as required under §§ 655.130–655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification* (Form ETA 9142), job order (Form ETA 790), and an attachment identifying, with as much geographic specificity as possible for each farmer/rancher, the names, physical locations and estimated start and end dates of need where work will be performed under the job order.

(1) The *Application for Temporary Employment Certification* and job order may be filed by an individual employer, association, or an H–2ALC, covering multiple areas of intended employment and more than two contiguous States.

(2) The total period of need identified on the *Application for Temporary Employment Certification* and job order for open range sheep or goat herding or production occupations must be no more than 364 calendar days. The total period of need identified on the *Application for Temporary Employment Certification* and job order for open range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.

(3) An association of agricultural employers filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States with different start dates of need. Unless modifications to a sheep or goat herding or production job order are required by the CO or requested by the employer, pursuant to § 655.121(e), the association is not required to re-submit the job order during the calendar year with its *Application for Temporary Employment Certification*.

**§ 655.220 Processing applications for temporary employment certification.**

(a) *NPC review.* Unless otherwise specified in this subpart, the CO will review and process the *Application for Temporary Employment Certification* and the job order in accordance with the requirements outlined in §§ 655.140–655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with §§ 655.140–655.141.

(b) *Notice of acceptance.* Once the job order is determined to meet all regulatory requirements, the NPC will issue a Notice of Acceptance consistent with § 655.143(b)(1). The CO will provide notice to the employer authorizing conditional access to the interstate clearance system; identify and transmit a copy of the job order to any

one of the SWAs having jurisdiction over the anticipated worksites, and direct the SWA to place the job order promptly in intrastate and interstate clearance (including all States where the work will take place); and commence recruitment of U.S. workers. Where an association of agricultural employers files as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit a copy of the job order to the SWA having jurisdiction over the location of the association, again directing that SWA to place the job order in intrastate and interstate clearance, including to those other States where the work will take place, and commence recruitment of U.S. workers.

(c) *Electronic job registry.* Under § 655.144(b), where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, the Department will keep the job order posted on the OFLC electronic job registry until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order.

**§ 655.225 Post-acceptance requirements.**

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. workers by the employer and SWA must be satisfied, as specified in §§ 655.150–655.158.

(b) *Interstate clearance of job order.* Pursuant to § 655.150(b), where a single job order is approved for an association of agricultural employers filing as a joint employer on behalf of its employer-members with different start dates of need, each of the SWAs to which the job order was transmitted by the CO or the SWA having jurisdiction over the location of the association must keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer-members identified on the job order, and must refer to the association each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to him/her absent a request for a different location by the U.S. worker. Employers must make reasonable efforts to accommodate such placement requests by the U.S. worker.

(d) The employer will not be required to place an advertisement in a newspaper of general circulation serving

the area of intended employment, as required in § 655.151.

(e) An association that fulfills the recruitment requirements for its members is required to maintain a written recruitment report containing the information required by § 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

**§ 655.230 Mobile housing.**

(a) Housing for work performed on the open range must be provided in accordance with this part. The regulations at § 655.122(d)(2) require that housing for work performed on the open range meet standards of the DOL Occupational Safety and Health Administration (OSHA). Since such standards do not currently exist, range housing must meet the minimum standards contained in § 655.235.

(b) The SWA with jurisdiction over the location of the mobile housing must inspect and certify that the mobile housing used on the open range is sufficient to accommodate the number of certified workers and meets all applicable standards contained in § 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards, the CO may deny the H–2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in § 655.235 only when the employer has received a certification from the SWA for the mobile housing it seeks to use within the past 36 months.

(2) To self-certify the mobile housing, the employer must submit a copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of workers being requested for temporary labor certification, and meets all the applicable standards for mobile housing contained in § 655.235.

(d) The use of mobile housing at a location other than the open range (e.g., at the farm or ranch), where fixed site employer-provided housing would otherwise be required, is permissible

only when the worker occupying the housing is performing work that constitutes the production of livestock or is minor, sporadic, and incidental to the herding or production of livestock. In such a situation, workers must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in § 655.122(d)(1)(i). When such work does not constitute the production of livestock or is not minor, sporadic, and incidental to the herding or production of livestock, workers must be housed in housing that meets all the requirements of § 655.122(d).

**§ 655.235 Standards for mobile housing.**

An employer employing workers under this subpart may use a mobile unit, camper, or other similar mobile housing vehicle that meets the following standards:

(a) *Housing site.* Mobile housing sites must be well drained and free from depressions where water may stagnate.

(b) *Water supply.* (1) An adequate and convenient supply of water that meets the standards of the state or local health authority must be provided. Water used for drinking and cooking must be potable or easily rendered potable, and the employer must provide the worker with the means to make the water potable. The amount of water provided must be enough for normal cooking, consumption, cleaning, laundry and bathing needs of each worker; and

(2) Individual drinking cups must be provided.

(c) *Excreta and liquid waste disposal.* (1) Facilities must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the state health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with state and local health and sanitation requirements.

(d) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window which can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial mobile housing.

(e) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and not reasonably expected to drop below 50 degrees Fahrenheit continuously for 24 hours, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor or roof.

(4) When a heating system has automatic controls, the controls must be of the type which cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) *Lighting.* (1) In areas where it is not feasible to provide electrical service to mobile housing, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

(2) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit, including tents.

(g) *Bathing, laundry, and hand washing.* Movable bathing, laundry and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) *Food storage.* When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

(i) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation; and

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be of fire-resistant material.

(j) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, including tents, for storing garbage and other refuse; and

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary.

(k) *Insect and rodent control.* Appropriate materials, including sprays, must be provided to aid housing occupants in combating insects, rodents and other vermin.

(l) *Sleeping facilities.* A separate sleeping facility must be provided for each person, except in a family arrangement. A sleeping facility or sleeping accommodation must include a comfortable bed, cot, or bunk with a clean mattress. When filing an application for certification and only where it is demonstrated to the CO that it is impractical to set up a second sleeping facility, the employer may request a variance from the separate sleeping facility requirement to allow for a second worker to temporarily join the open range operation. The second worker may be temporarily housed in the same sleeping facility for no more than 3 consecutive days, and the employer must supply a sleeping bag or bed roll for the second occupant free of charge.

(m) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable state or local fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Mobile housing units for range use must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when

large tents with walls of rigid material are used.

(5) Adequate fire extinguishers in good working condition and first aid

kits must be provided in the mobile housing.

**Portia Wu,**

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[FR Doc. 2015-08505 Filed 4-14-15; 8:45 am]

**BILLING CODE 4510-FP-P**